(20,736.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 96.

JOHN N. BAGLEY, PLAINTIFF IN ERROR,

vs.

GENERAL FIRE EXTINGUISHER COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 18, 1908.

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a United States Circuit Court of Appeals for the Second Circuit.

JOHN N. BAGLEY, Plaintiff in Error (Plaintiff Below),
vs.
THE GENERAL FIRE EXTINGUISHER COMPANY, Defendant in Error (Defendant Below).

Transcript of Record.

Error to the Circuit Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Feb. 24, 1906. William Parkin, Clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between John N. Bagley, as plaintiff, and General Fire Extinguisher Company, as defendant, a manifest error hath happened, to the great damage of the said John N. Bagley as is said and appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 12th day of December, 1905, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct that error,
2 what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of November, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from 3 to 218, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of John N. Bagley, plaintiff in error, against General Fire Extinguisher Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit this 15th day of February, in the year of our Lord one thousand nine hundred and six,
3 and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit.—John N. Bagley, Plaintiff in Error, *vs.* General Fire Extinguisher Company, Defendant in Error.—Writ of Error.—Parsons, Closson & McIlvaine, Attorneys for Plaintiff in Error, No. 52 William St., Borough of Manhattan, The City of New York, N. Y.—Service of a copy of the within Writ of Error is hereby admitted this 17th day of November, 1905, Olney & Comstock, Attorneys for Defendant in Error.—U. S. Circuit Court, Southern District, New York.—Filed Nov. 20, 1905.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

JOHN N. BAGLEY
against
THE GENERAL FIRE EXTINGUISHER COMPANY.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney
4 within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, this 26th day of April, in the year one thousand nine hundred and two.

[L. S.] JOHN A. SHIELDS, *Clerk.*

PARSONS, SHEPARD & OGDEN,
Plaintiff's Attorneys.

Office and Post Office Address, 111 Broadway, Borough of Manhattan, New York City.

Circuit Court of the United States, Southern District of New York.

JOHN N. BAGLEY
against
THE GENERAL FIRE EXTINGUISHER COMPANY

The plaintiff, by Parsons, Shepard & Ogden, his attorneys, complaining of the defendant, respectfully shows to the Court:

At all times hereinafter averred John N. Bagley, Paul F. Bagley, Frances Bagley Brown, Florence Bagley Sherman, Olive Bagley Buttrick, Helen Bagley Anderson, Margaret Bagley Hosmer,
5 and Joseph T. Mason, George H. Hopkins and John N. Bagley, as surviving trustees under the last will and testament of John J. Bagley, deceased (hereinafter styled the plaintiff's assignors), were the owners and landlords of certain real estate, with the buildings thereon erected, situated in the City of Detroit, in the State of Michigan, and known as Nos. 19 to 33 Larned street, in said city. At the time of the commencement of this action the plaintiff and each one of the plaintiff's assignors was and now is a citizen and resident of the State of Michigan, excepting the said Olive Bagley Buttrick, who then was and now is a citizen and resident of the State of Massachusetts, and the said Helen Bagley Anderson, who then was and now is a citizen and resident of the State of Colorado. At the time of the commencement of this action the defendant was and now is a domestic corporation, organized under the laws of the State of New York, a citizen of that State and a resident of the Southern District of New York.

On or about the 20th day of April, 1896, at the City of Detroit, in the State of Michigan, the plaintiff's assignors, under the name and style of "Estate of John J. Bagley," in which they managed the premises as aforesaid, and the defendant entered into a certain agreement in writing. The defendant thereby promised and agreed to furnish and erect in the said building a system of wet pipe Grenell automatic sprinklers, and furthermore expressly warranted that all of the materials thereof should be first class and that all the work should be done in a thorough and workmanlike manner and in conformity with the Improved Risk's Commission Standard for automatic sprinkler installations.

The plaintiff's assignors were wholly ignorant of and unskilled in the manufacture and installation of automatic sprinklers, and throughout their dealings with the defendant in regard
6 thereto herein averred, relied wholly upon the knowledge and judgment of the defendant in regard thereto and upon the agreements and warranties made by the defendant in relation to the same as hereinafter averred. The defendant was the maker and manufacturer of the automatic sprinklers and sprinkler heads used in the said system and of the system itself, and well knew that the purpose for which the said system of sprinklers was intended to be installed in the said building was that the pipes and tanks which formed a part of the said system should be kept filled with water,

and that by means of the automatic sprinkler heads used in said system, this water should be retained in the pipes and tanks at any temperature to which the sprinkler heads where placed by the defendant would be subjected by the heat of the sun alone or by the ordinary artificial heat used in warming the building in cold weather, and should be discharged only when the sprinkler heads should be exposed to such higher temperature as would be produced by the breaking out of a fire in the portion of the building where the sprinkler head should be located. As the plaintiff is informed and believes, the defendant, in addition to the express warranty aforesaid, furthermore impliedly warranted to the plaintiff's assignors that the said sprinkler heads and sprinkler system should be located with reasonable care and should be reasonably fit for the said use for which they were intended and free from any defects which the plaintiff's assignors, ignorant as they were of such matters, as hereinbefore averred, could not themselves discover with the exercise of reasonable diligence on their part upon inspecting the same; and which arose from the process of manufacture or the use of defective materials. In consideration of the premises, the plaintiff's assignors
7 agreed to pay the defendant the total sum of forty-eight hundred dollars ($4,800), one-third thereof when the material should be delivered and the work commenced, the remainder in thirty days after the completion of the work. The defendant thereupon did furnish and erect in said building a system of wet pipe Grenell automatic sprinklers, and the plaintiff's assignors pursuant to the terms of the contract in that regard, thereupon duly paid them therefor the said sum of forty-eight hundred dollars ($4,800).

Certain of the materials, to wit, the sprinkler heads hereinafter referred to, furnished and erected by the defendant as aforesaid, were not first class; and certain of the work done by it under the said contract, to wit, the erection of the sprinkler heads and pipes in the two skylights or cupolas hereinafter referred to, was not done in either a thorough or workmanlike manner. The said sprinkler heads, sprinkler and system were not reasonably fit for the said use for which they were intended, as aforesaid. On the contrary, they contained defects which the plaintiff's assignors could not and did not discover with the exercise of reasonable diligence on their part on inspecting the same, all of which arose from the process of manufacture and the use of defective materials therein; and the defendant negligently, unskilfully and in an unworkmanlike manner erected in each of the two skylights or cupolas at the top of the said building, which were built with glass sides and almost completely closed at the bottom with glass, and in which close place the air, by reason of the sun's rays, in summer becomes very hot, sprinkler heads not of first-class material, but of inferior and unsuitable material, in that they were composed of metal of too little power of resistance to heat and fusible at too low a temperature, and of a metal not sufficiently reliable, to wit, sprinkler heads intended to fuse and release water at about the
8 temperature of 155 degrees Fahrenheit, and which, as the defendant well knew, might reasonably be expected to fuse at a much lower temperature; when, in the performance of the

said agreement, by furnishing first-class materials and doing the work in a thorough and workmanlike manner, sprinkler heads made as above stated and intended to fuse at the said degree of heat ought not to have been placed in the said skylights or cupolas, as the defendant well knew, but sprinklers of a much higher degree of hardness should have been used, or none whatever placed in the said cupolas.

Thereafter, in consequence of the failure in the manner aforesaid of the defendant to perform its contract and by reason of its negligence in the particulars aforesaid in installing and erecting the said sprinkler system, and on the 4th day of July, 1897, from the heat of the sun only and without the existence of any fire in the said building, one of the said sprinkler heads in each of the said skylights fused, melted, opened and released the water in certain pipes and tanks connected with said sprinkler heads and furnished and erected by the defendant as a part of its said system of automatic sprinklers; large quantities of water thereupon flowed from said sprinklers through the said building and injured the same greatly, and injured also, to the extent of over eighteen thousand dollars ($18,000), certain stocks of goods and machinery which were therein, making them less valuable by that amount than they were before being damaged by said water. The portion of the said building known as Stores 19 to 29 was then occupied by the firm of Burnham, Stoepel & Company, wholesale drygoods merchants; and the portion of the said building known as Stores 31 and 33 was then occupied by the Peerless Manufacturing Company, a Michigan corporation engaged in the manufacture and sale of drygoods and wearing apparel. Both the said firm and the said corporation were then in possession
9 thereof as tenants of the plaintiff's assignors.

Thereafter the said Peerless Manufacturing Company brought an action in the Circuit Court for the County of Wayne and State of Michigan, against certain of the plaintiff's assignors, to wit: all of them except the said Margaret Bagley Hosmer, to recover for the loss sustained by it by reason of the flooding as aforesaid of the premises occupied by it and its property therein contained as aforesaid. The defendant was duly notified of the commencement of the said action and was requested to defend the same by the plaintiff's assignors. The plaintiff's assignors contested and defended the said action with all due diligence, but despite their defense such proceedings were therein had that on or about the 26th day of February, 1900, a judgment against the defendants in said action was duly rendered for the sum of four thousand, six hundred and 86/100 dollars ($4,600.86) damages and ninety-five and 30/100 dollars ($95.30) costs, making in all the sum of four thousand, six hundred and ninety-six and 16/100 dollars ($4,696.16). In the plaintiff's declaration in the said action it was alleged and by the said judgment it was adjudged that one of the sprinkler heads above referred to, viz.: that placed in the skylight or cupola over the portion of the premises occupied by the said plaintiffs, had been negligently and improperly made of such material as to fuse at too low degree of temperature, to wit: a temperature to which the said sprink-

ler as situated in the said cupola would be raised only by the heat of the sun without any fire in the building, and that such sprinkler and the pipes connected with it had been negligently and improperly erected and located in the cupola aforesaid, and that the plaintiff in said action, to wit: the said Peerless Manufacturing Company,
10 the tenant aforesaid of the plaintiff's assignors, had been wholly without negligence in the premises, and that by reason of the negligent acts aforesaid in regard to the composition, erection and location of the said sprinkler head and the piping connected with it, the said sprinkler head had on the said 4th day of July, 1897, when there was no fire in the building, but only the heat of a summer's day, melted, and the water in the pipes connected with it had been thereby discharged through the premises occupied by the plaintiff in said suit and upon the stock and machinery of the said plaintiff there situated, and that said stock and machinery had thereby been damaged to the amount of said sum of four thousand, six hundred and 86/100 dollars ($4,600.86). The said judgment, after affirmance thereof by the Supreme Court of the State of Michigan, the plaintiff's assignors were afterwards, to wit: on the 13th day of April, 1901, compelled to and did pay, with costs and interests, the amount so paid them being five thousand and four and 06/100 dollars ($5,004.06).

On the said 4th day of July, 1897, the said firm of Burnham, Stoepel & Company, tenants of the plaintiff's assignors as aforesaid, were insured by the United States Casualty Company, an insurance corporation organized and existing under the laws of the State of New York, against such loss or damage to their property situated on the premises in question, as might be occasioned by the accidental discharge or leakage of the said automatic sprinkler system, under a policy which provided, among other things, that the said Casualty Company should be subrogated to the extent of its interest to all claims or rights of the insured thereunder against any third party in respect to any loss that might occur under the said policy, and that the said insured should execute all papers necessary for this purpose. Thereafter the said Burnham, Stoepel & Company
11 brought an action in the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, against the said United States Casualty Company, to recover the loss and damage to their property situated on the premises in question which had been occasioned as aforesaid, to wit: by reason of the flooding as aforesaid of the said premises and the property of the said Burnham, Stoepel & Company therein contained. In such action such proceedings were thereupon had that on or about the 12th day of January, 1898, a judgment of the said Circuit Court of the United States was duly rendered, whereby it was adjudged that the defendant therein, the said United States Casualty Company should pay to the plaintiffs therein, the said Burnham, Stoepel & Company, the sum of twelve thousand and five and 59/100 dollars ($12,005.59) in satisfaction of the liability of the said Casualty Company to the plaintiffs therein under its said policy for the loss and damage to the property of the plaintiffs therein occasioned as aforesaid. Thereafter and on

or about the 6th day of June, 1898, the said United States Casualty Company paid to said Burnham, Stoepel & Company the said sum of twelve thousand and five and 59/100 dollars ($12,005.59), and interest and costs in addition, making in all twelve thousand, four hundred and fifty-nine and *and* 26/100 dollars ($12,459.26) in satisfaction of their right of action under the said policy for the loss caused them by the flooding as aforesaid, and took from the said firm an assignment of their right of action and claims by reason of the premises against the plaintiff's assignors as owners of the said premises. Thereafter the said United States Casualty Company brought an action in the Circuit Court for the County of Wayne and State of Michigan, against certain of the plaintiff's assignors, to wit:

12 the said John N. Bagley, Paul F. Bagley, George H. Hopkins and Joseph T. Mason, to recover for the loss sustained by it and by the said Burnham, Stoepel & Company by the reason of the flooding as aforesaid of the premises occupied by the said firm and its property therein contained as aforesaid. The defendant herein was duly notified of the commencement of the said action and was requested to defend the same by the plaintiff's assignors. The plaintiff's assignors contested and defended the said action with all due diligence, but despite their defence, such proceedings were therein had that on or about the 10th day of June, 1901, a judgment against the defendants in said action was duly rendered for the sum of thirteen thousand, four hundred and forty-four and 40/100 dollars ($13,444.40), damages and costs, making in all the sum of thirteen thousand, five hundred and forty-eight and 95/100 dollars ($13,548.95). In the plaintiff's declaration in the said action it was alleged, and by the said judgment it was adjudged, that one of the sprinkler heads above referred to, to wit: that placed in the skylight or cupola over the portion of the premises occupied by the said Burnham, Stoepel & Company, had been negligently and improperly made of such material as to fuse at too low degree of temperature, to wit: a temperature to which the said sprinkler as situated in the said cupola would be raised only by the heat of the sun without any fire in the building, and that such sprinkler and the pipes connected with it had been negligently and improperly erected and located in the cupola aforesaid, and that the said Burnham, Stoepel & Company had been wholly without negligence in the premises, and that by reason of the negligent acts aforesaid in regard to the composition, erection and location of the said sprinkler head and the piping connected with it, the said sprinkler head had on the said 4th

13 day of July, 1897, when there was no fire in the building, but only the heat of a summer's day, melted, and the water in the pipes connected with it had been thereby discharged through the premises occupied by the said Burnham, Stoepel & Company, and upon their stock and machinery there situated, and that said stock and machinery had thereby been damaged to the amount of the said sum of thirteen thousand, four hundred and forty-four and 40/100 dollars ($13,444.40). The said judgment, after affirmance thereof by the Supreme Court of the State of Michigan, the plaintiff's assignors were afterwards, to wit: on the 9th day of December, 1901,

compelled to pay and did pay, with costs and interest, the amount so paid by them, being the sum of thirteen thousand nine hundred and thirty-nine and 72/100 dollars ($13,939.72).

Besides the said amounts paid by them in satisfaction of the said two judgments, the plaintiff's assignors in the defense of the said two actions necessarily incurred liabilities and paid, laid out and expended in the defense thereof of counsel fees and other necessary expenses, reasonably and properly incurred by them in the conduct of such defense, in all the sum of about three thousand dollars ($3,000). All of the said disbursements so made by the plaintiff's assignors in the defense of the said suits were reasonable in amount and necessarily incurred by them therein. No part of any of the amounts so paid by the plaintiff's assignors, either in satisfaction of the said judgment or for the expenses of the defense of such suits as aforesaid, has ever been repaid by the defendant to them or to the plaintiff, although payment thereof has been duly demanded.

Thereafter and on or about the 14th day of February, 1902, and prior to the commencement of this action, the plaintiff's assignors and each of them duly sold, assigned, transferred and set over to the plaintiff, all their, his and her claims, demands, ac-
14 tions and causes of action against the defendant arising under or out of the payment of the said judgments, and the other matters and things above set forth, or otherwise.

Wherefore the plaintiff demands judgment against the defendant for the sum of twenty-one thousand, nine hundred and forty-three and 78/100 dollars ($21,943.78), with interest on five thousand and four and 96/100 dollars ($5,004.96) thereof from the 13th day of April, 1901, on thirteen thousand, nine hundred and thirty-nine and 72/100 ($13,939.72) thereof from the 9th day of December, 1901, and on three thousand dollars ($3,000.00) thereof from the 14th day of February, 1902, together with the costs of this action.

——— ———,
Plaintiff's Attorneys.

Office & Post Office Address, 111 Broadway, Borough of Manhattan, New York City, N. Y.

STATE OF MICHIGAN,
Eastern District of Michigan,
Southern Division, County of Wayne, ss:

John N. Bagley, being duly sworn, deposes and says: I am the plaintiff in this action. The foregoing complaint is true of my knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matter- I believe it to be true.

JOHN N. BAGLEY.

Sworn to before me this 13th day of May, 1902.

[SEAL.] ALBERT J. SYMINGTON,
Notary Public, Wayne County, Michigan.

15 Circuit Court of the United States, Southern District of New York.

JOHN N. BAGLEY, Complainant,
against
THE GENERAL FIRE EXTINGUISHER COMPANY, Defendant.

The defendant, by Olney & Comstock, its attorneys, answering the complaint herein, alleges:

First. It has no knowledge, or information sufficient to form a belief, as to the allegations contained in the second and third folios of the complaint, except that it admits that at the time of the commencement of this action it was, and now is, a domestic corporation, organized under the laws of the State of New York.

Second. It admits that on or about the twentieth day of April, 1896, at Chicago, in the State of Illinois, it, the defendant, entered into a certain agreement in writing, being the agreement referred to in the bill of particulars herein as "Exhibit A," and that the said estate of John J. Bagley and this defendant promised and agreed as in said agreement more fully set forth. Otherwise it denies the allegations of the complaint, contained therein, beginning with the words: "On or about the twentieth day of April, 1896," in folio 4 of said complaint, and ending with the words: "For Auto-
16 matic Sprinkler Instal-ations," in folio 5 of said complaint.

Third. The defendant has no knowledge, or information sufficient to form a belief, as to the truth of the allegations in the fifth folio of said complaint, that the plaintiff's assignors were wholly ignorant of, and unskilled in the manufacture and instal-ation of automatic sprinklers; and the defendant denies that throughout their dealings with it, the defendant, in regard thereto, as averred in the complaint, the said plaintiff's assignors relied wholly or in part upon the knowledge and judgment of the defendant in regard thereto; and this defendant denies that it made any agreements or warranties in relation thereto, except as set forth in writing in the aforesaid written agreement.

Fourth. This defendant admits that it was the maker and manufacturer of the automatic sprinklers and sprinkler heads used in the system mentioned and referred to in the aforesaid written agreement, and also of the system itself; and also that at and prior to the making of said agreement it knew that the purpose for which the said system of sprinklers was intended to be installed in the building referred to in the complaint was that the pipes which formed a part of the said system should be kept filled with water, and that by means of the automatic sprinkler heads used in said system this water should be retained in the pipes and tanks up to a certain temperature. Otherwise this defendant denies the allegations contained in the sixth folio of the complaint, beginning with the words: "The defendant was the maker," and in the seventh folio of the complaint, ending with the words: "Where the sprinkler head should be located."

17 Fifth. This defendant denies the allegations contained in said complaint, beginning with the words, in the seventh folio thereof: "As the plaintiff is informed and believes, the defendant, in addition to the express warranty aforesaid, furthermore impliedly warranted," and ending with the words, in the eighth folio thereof: "Or the use of defective materials."

Sixth. The defendant admits that the aforesaid estate of J. J. Bagley, being the other party to the aforesaid written agreement, therein and thereby agreed to pay to it, the defendant, in consideration of the work, labor and materials to be supplied by the defendant under said agreement, the sum of four thousand eight hundred dollars ($4,800), one-third thereof when the materials should be delivered, and the work commenced, and the remainder thereof within thirty days after the completion of the work; and also that, pursuant to said agreement, the defendant did furnish and erect in said building a system of wet pipe Grinnell automatic sprinklers, and did otherwise carry out and fulfill all the terms and conditions of said agreement on the part of it, the defendant, to be performed and fulfilled; and that thereupon the said estate of J. J. Bagley, pursuant to the terms of the agreement in that respect, did pay to it, the defendant, therefor, that is to say, for the aforesaid work, labor, and materials, the aforesaid sum of four thousand eight hundred dollars ($4,800).

Seventh. The defendant denies all of the allegations contained in the complaint, beginning with the words, at the end of the ninth folio thereof: "Certain of the materials, to wit," including all of the allegations contained in the tenth, eleventh and twelfth

18 folios thereof, and also the thirteenth folio thereof, ending with the words therein: "Or none whatever placed in the cupolas;" except that this defendant admits that the sprinkler heads mentioned and referred to in said complaint were intended to fuse and release water at about the temperature of 155° Fahrenheit.

Eighth. This defendant denies all of the allegations of the complaint beginning with the words, in the thirteenth folio thereof: "Thereafter, in consequence of the failure," and contained in all of the fourteenth folio thereof, ending with the words: "As tenants of the plaintiff's assignors;" except that this defendant admits that on or about the fourth day of July, 1897, one or more of the said sprinkler heads mentioned in the complaint fused, melted, opened, and released the water in certain of the pipes and tanks connected with said sprinkler heads, and that thereby certain quantities of water flowed from said sprinklers in said building, and injured the same, and also certain stocks of goods and machinery which were therein, to an extent, and in an amount unknown to this defendant; and also that at said time the portion of the building referred to in the complaint known as stores 1 to 29, was then occupied by the firm of Burnham, Stoepel & Company, wholesale dry goods merchants, and the portion of said building known as stores 31 and 33 was then occupied by The Peerless Manufacturing Company, a Michigan corporation, engaged in the manufacture and sale of dry goods and wearing apparel, and also that it has no knowledge, or information

sufficient to form a belief, whether or not the said firm and the said corporation were then in possession thereof as tenants of the plaintiff's assignors.

Ninth. This defendant has no knowledge, or information
19 sufficient to form a belief, as to the allegations contained in the fifteenth folio of the said complaint, beginning with the words: "Thereafter the said Peerless Manufacturing Company," and also in the sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth and thirty-first folios of the complaint, except that it denies that it, the defendant, was duly notified of the commencement of the action, referred to in said complaint, brought by The Peerless Manufacturing Company in the Circuit Court for the County of Wayne, and State of Michigan, against certain of the plaintiff's assignors, and was requested to defend the same by the plaintiff's assignors; and also that it, the defendant, was duly notified of the commencement of the action, referred to in the twenty-fifth folio of the complaint, by The United States Casualty Company against certain of the plaintiff's assignors, and was requested to defend the same by the plaintiff's assignors.

Tenth. For a separate and further defense, the defendant alleges, here repeating the admissions and denials hereinbefore contained, that, heretofore, and on or about the twentieth day of April, 1896, at the City of Chicago, Illinois, it entered into a contract or agreement with the estate of John J. Bagley to equip the property of said estate, known as 19 to 33 Larned street, Detroit, Michigan, with an approved system of fire extinguishing apparatus, as more fully set forth in said agreement, which was in writing, and which is the agreement annexed to the bill of particulars of the plaintiff herein, verified July 25, 1902; and that thereupon it proceeded to carry out and fulfil said agreement in the manner, and as directed and specified in said agreement and by the said estate of J. J. Bagley,
20 or its agent, having full knowledge of the said agreement, and of the quality and character of the work, labor and materials to be used in carrying out said agreement, and thereupon completed all the work, labor and material provided for by said agreement, and otherwise carried out and fulfilled all the conditions of said agreement on its part to be fulfilled; and the said work, labor, and materials having been completed, the same was acepted, with full knowledge by the said estate of J. J. Bagley, the other party to the agreement, or by its agent or agents, duly authorized thereto; and, having been so accepted, was paid for, in accordance with the terms of said agreement, by the said estate of John J. Bagley.

Wherefore, the defendant demands judgment, that the complaint herein be dismissed, together with the costs and disbursements of this action.

OLNEY & COMSTOCK,
Defendant's Attorneys, No. 68 William Street, New York City.

COUNTY OF NEW YORK, *ss:*

George Carlton Comstock, being duly sworn, says:

I am one of the defendant's attorneys herein. I have read the foregoing answer, and know the contents thereof; and the same is true, of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason I make this verification, instead of the defendant, is because the defendant is a corporation; because none of its officers reside or are within the State of New York; and because I am one of its attorneys of record in this action. My knowledge and in-
21 formation as to the matters stated in said answer are derived from conversations had with the officers of the said corporation who have had charge of the matter, and also correspondence had with them.

(Sgd.) GEO. CARLTON COMSTOCK.

Sworn to before me this 8th day of August, 1902.

LESLIE R. PALMER,
Notary Public, N. Y. Co.

At a Stated Term of the Circuit Court of the United States, held in and for the Southern District of New York, at the United States Court House and Post Office Building, on the 16th day of January, 1905.

Present: Hon. James P. Platt, Acting Circuit Justice.

JOHN N. BAGLEY, Plaintiff,
against
THE GENERAL FIRE EXTINGUISHER COMPANY, Defendant.

Upon reading and filing the consent of both parties hereto, it is Ordered that the issues in this case be, and they hereby are, referred to Charles F. Brown, Esq., to hear and determine.

JAMES P. PLATT,
U. S. Judge.

22 We hereby consent to the entry of the foregoing order.
Dated January 16, 1905.

PARSONS, CLOSSON & McILVAINE,
Plaintiff's Attorneys.

OLNEY & COMSTOCK,
Defendant's Attorneys.

(Endorsed:) U. S. Circuit Court, Southern District of New York.—John N. Bagley, against The General Fire Extinguisher Company.—Order and Consent to Reference.—Parsons, Closson & McIlvaine, Attorneys for Plaintiff, 52 William Street, New York City.—U. S. Circuit Court, Southern District New York.—Filed Jan. 16, 1905.—John A. Shields, Clerk.

23 *Case and Exceptions.*

Circuit Court of the United States, Southern District of New York.

JOHN N. BAGLEY, Plaintiff,
against
GENERAL FIRE EXTINGUISHER COMPANY, Defendant.

This case came on to be tried before Charles F. Brown, Esq., the Referee duly appointed by the Court to hear and determine the issues therein, on the 16th day of January, 1905; and on subsequent dates to and including the 1st day of February pursuant to adjournments regularly ordered.

Mr. H. B. Closson and Mr. A. C. Angel appeared as Counsel for the Plaintiff; and

Mr. George Carlton Comstock, Mr. J. H. Barnard and Mr. Peter B. Olney as Counsel for the Defendant.

The plaintiff opened the case, and to maintain the issues on his part, called as a witness.

24 GEORGE H. HOPKINS, who, being duly sworn, testified as follows:

Direct examination by Mr. ANGEL:

I live in Detroit, Michigan. I am one of the trustees under the will of the late John J. Bagley. That estate owned in 1896 and 1897 the premises on the northerly side of Larned Street, east of Bates Street, known as Nos. 19 to 33. It was a brick and stone building, five stories and basement, gravel roof. The building was 162 feet in front in length and 120 feet deep, and there were three skylights. One was over the portion of the building known as Nos. 31 and 33, the eastern portion, and the other two over the westerly portion. After the 1st of July, 1896, Burnham, Stoepel & Company occupied the westerly portion, and the concern known as the Peerless Manufacturing Company occupied the east 42 feet. At that time Mr. John N. Bagley and myself had the active management for the estate of this property. He and I conducted the negotiations in behalf of the estate leading up to the contract with the defendant marked Exhibit A attached to the complaint. At the time we entered into that contract I knew nothing as to the proper method and arrangement of automatic fire extinguishing apparatus from my own personal knowledge, except as explained to me by the agent of the sprinkler company in connection with this matter and with another building which they had equipped for us a short time before. I had no knowledge that enabled me to judge of the safety or otherwise of the method used in installing the apparatus in this building. During the progress of the work of installation I gave no instructions with reference to the placing of pipes or heads or other apparatus. The sprinkler people prepared the plans for the installation work

and we relied, as regards the propriety and safety of the in-
25 stallation, on their reputation. At the time the installation of this system was begun, the skylights that I have spoken of were in place on the building roof. Between the time of the installation and the time of the accident I don't think there were any changes whatever made in them, but I am not certain. I made none for the estate.

Cross-examination by Mr. OLNEY:

I and Mr. Bagley, our other active associate, visited the premises in question while this sprinkler plant was being installed. I would not say every day, but very frequently, Sunday, July 4th, 1897, was a holiday and the Monday following also.

The Improved Risks Commission was some commission provided for by the Board of Underwriters, what its nature was I do not know. I understood it was an underwriters' or insurance company's association. The representative of that Commission at Detroit in connection with this work was Robert Jardine. The other sprinkler plant that was installed previous to this by the company was directly in the rear of a portion of this building. I think that also was approved by the Improved Risks Commission. We did not pay the defendant for the work done under the contract in suit here until it had been approved by them. After the sprinkler equipment was installed we obtained a decrease in our insurance rates on the buildings and our tenants did on their stock.

Paper shown witness.

I recognize that as the form of approval of the Improved Risks Commission. Before we paid this my impression is that I saw this, either Mr. Bagley or myself saw it.

26 JOHN N. BAGLEY, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. ANGEL:

I am the plaintiff. I live in Detroit. I am one of the trustees under the will of my father, the late John J. Bagley. As regards meeting the representatives of the Fire Extinguisher Company and dealing with them, Mr. Hopkins and I were the men. At the time the contract was signed, and thereafter for more than a year, I had no knowledge of the proper construction for the sake of safety of a sprinkler apparatus, or the proper mode of arranging it. I gave no directions at all to the defendant as to how it should install this plant or what sort of apparatus it should be. I had nothing to do with reference to the preparation of the plans under which the system was installed. In July, 1896, I made a suggestion as to the location of a pipe which was going up through the store of Burnham, Stoepel & Company, entirely as to the appearance of the store; it was an objection raised by Burnham, Stoepel & Company as to the pipe going through the center, as it were, of their store. Beyond making that suggestion I did not even make a suggestion as to how they should locate their apparatus.

Letter shown witness.

I wrote that letter and sent to Mr. Dawley, their Chicago agent, the man with whom we were dealing.

The letter was received in evidence.

It reads as follows:

27 PL'FF'S EX. 1, -16-05.

Estate of John J. Bagley.

DETROIT, MICHIGAN, *July 22d*, 1896.

(Received July 29, 1896; answered 23, B. W. Dawley, Dep't Agent.)

B. W. Dawley, Department Agent.

DEAR SIR: Your letter of the 21st inst. to Messrs. Donaldson & Meyer has been turned over to us. In regard to changing the position of the upright pipes on the ground floor of the Burnham & Stoepel building, it is my opinion that if they are put up as your plans call for it will be anything but a good looking job. Here is a large floor space, one hundred feet square, and in two places you propose to run up, three or four inches from the iron posts that are now there, two four or five-inch pipe. It will destroy the good appearance of the floor and will be altogether a "dutchy" looking piece of work. Mr. Meyer suggested, and it seems to me a very good one, that you run the pipes up at the end of the two brick walls, which come into the building about twenty-five feet from the rear. There they would be out of sight and hardly noticeable, and it would require but a few additional feet of pipe. It will certainly not be satisfactory to have them run up as they are now placed, and we must request you to change them.

Respectfully,

JNO. J. BAGLEY ESTATE.
JOHN N. BAGLEY, *Trustee.*

28 Beyond such suggestion as I made in the paper marked Plaintiff's Exhibit 1, I made no other suggestion and gave no other direction with reference to the location of the pipes, the heads or other apparatus in this sprinkler system. Mr. Dawley, the manager of this concern in Chicago, came to Detroit soon after the flooding of the stores. I went to the building with him. After that conversation he sent us a box of the harder heads from Chicago, of the 286° heads.

Cross-examination by Mr. OLNEY:

We understood that the system of the defendant was the best system in the country, and the responsibility of the firm was unquestioned. The work called for by their contract was afterwards done in those two stores. I knew that before the system was accepted by the insurance companies, so that they would give the reduced insurance rate, it had to be approved by a man appearing for them. Mr.

Jardine examined the system and approved of it with the exception that some additional sprinkler heads had to be added to the number already put in. They were added.

Following three letters read in evidence by defendant:

"Improved Risk Commission.

Robert Jardine, Inspector.

CHICAGO, *October* 23, 1896.

General Fire Extinguisher Company, Pullman Building, Chicago.

DEAR SIR: We are in receipt of information concerning the Burnham, Stoepel & Company sprinkler system, Detroit, Michigan, to the effect that our requirements have been complied with, ex-
29 cepting the one calling for the substitution of brass for iron plugs in drain pipes. With the exception of this the equipment is satisfactory and meets with our approval.

Yours truly, ROBERT JARDINE, *Inspector.*"

By Mr. OLNEY:

It appears that the things mentioned in the exception were afterwards supplied.

The plaintiff admits this.

"Estate of John J. Bagley.

DETROIT, MICH., *May* 27, 1906.

B. W. Dawley, Department Agent, Chicago.

DEAR SIR: We enclose you herewith your proposal to do the sprinkler work, signed and accepted by us. We note that in the list of items you anticipate having one 12,000-gallon gravity tank. You remember when here that Mr. Chapman said we would have to have a 15,000-gallon gravity tank. We trust that you have made no mistake, for we expect the system to be approved by the insurance companies before its acceptance. We would like to have this work go forward as soon as possible.

Respectfully, JOHN N. BAGLEY, *Trustee.*"

Mr. Chapman was the chairman of this underwriters' board in Detroit. On the 21st of October, 1896, we sent defendant $2,982.07 on account; and on the 23d of November, 1896, a draft which balanced the account. After we paid this we obtained for the buildings a less rate of insurance. We understood that this system
30 was inspected by a representative of the Fire Extinguisher people, Mr. Jardine; it was in order to determine the question of the reduction of the rates of insurance. We knew that we could not get any reduction of insurance rate, or the tenants, until this inspection had been made by the inspector. Before we paid the balance of this contract price we knew that the matter had been approved by the Improved Risk Commission. It must have been

so or we would not have paid it. I knew the general purpose of the gong, that it was intended to give the alarm in case the water came out of the pipe. No watchman was employed by the Bagley estate. There was no day watchman employed by the tenants.

Plaintiff offered in evidence an exemplification of the record of the case of the Peerless Manufacturing Company against John N. Bagley and others, the case to which we have alluded.

Judgment roll received in evidence and marked Plaintiff's Exhibit 4, of this date.

PLAINTIFF'S EXHIBIT 4—ABSTRACT.

The complaint is set forth at length in the Referee's finding numbered Twenty-third.

The defendants' answer considered of a plea of the general issue.

The verdict of the jury was as follows:

"That the said defendants are guilty in manner and form as the said plaintiff hath in its declaration of this cause complained against them and that they assess its damages on occasion of the premises over and above its costs and charges by it about its suit in this behalf expended at the sum of Four thousand six hundred and 86-100 dollars ($4,600.86)."

31 The judgment, dated February 26th, 1900, provides:

"That the said plaintiff do recover against the said defendants its damages assessed, as aforesaid, together with its costs and charges to be taxed, and that the plaintiff have execution thereof."

The total amount of the judgment, including costs, was, as stated in the Twenty-second Finding of the Referee, $4,696.16.

Upon writ of error to the Supreme Court of the State of Michigan it was thereafter on April 2, 1901, adjudged that the judgment of the Circuit Court be affirmed with costs.

Plaintiff offered exemplified copy of the record in the case of the United States Casualty Company *vs.* Bagley and others, defendants.

Received and marked Plaintiff's Exhibit 5 of this date.

PLAINTIFF'S EXHIBIT 5—ABSTRACT.

The declaration as found by the Referee in his Twenty-sixth Finding of Fact is substantially identical with that in the case of the Peerless Company, with the addition of allegations of the issuing by the company of its policy to Burnham, Stoepel & Company, the recovery by Burnham, Stoepel & Company against it of their judgment, and the payment by the company, in satisfaction of it, of $12,459.26, and the company's subrogation thereby to the rights of Burnham, Stoepel & Company against the defendants.

The defendants' answer consisted of a plea of the general issue.

The verdict of the jury was:

"That the said defendants are guilty in manner and form
32 as said plaintiffs hath in their declaration in this cause complained against them, and they assessed the damages on occasion of the premises over and above *his* costs and charges by *him* about their suit in this behalf expended at the sum of $13,444.40."

The judgment dated June 10th, 1901, provides:

"That the said plaintiff do recover against the said defendants its damages assessed as aforesaid, together with its costs and charges to be taxed, and that said plaintiff have execution therefor."

The total amount of the judgment, including costs, was, as stated in the Referee's Twenty-fifth Finding of Fact, $13,548.95.

Upon a writ of error to the Supreme Court of the State of Michigan, it was thereafter, on December 3, 1901, adjudged that the judgment of the Circuit Court be affirmed with costs.

Plaintiff offered in evidence a similar exemplified copy of the record in the case of James K. Burnham and others against the United States Casualty Company.

Received and marked Plaintiff's Exhibit 6 of this date.

PLAINTIFF'S EXHIBIT 6—ABSTRACT.

The declarations alleges the issuing by the defendant of a policy of insurance indemnifying them against loss or damage "by the ac-
" cidental discharge or leakage of the automatic sprinkler system
" now erected upon the part of the premises occupied by the said
" plaintiffs."

It further alleges that on July 4th, 1897,
33 "great loss and damage occurred to the said plaintiffs through and by means of an accidental discharge or leakage of said automatic sprinkler system upon the premises aforesaid, of said plaintiffs, whereby great quantities of water were discharged upon and saturated the stock in trade and property of the said plaintiff's, and whereby such stock in trade and property was damaged in a large sum, to wit, Fifteen thousand dollars ($15,000)."

Upon the petition of the defendant the cause was removed from the Michigan Circuit Court of Wayne County into the Circuit Court of the United States for the Eastern District of Michigan.

The defendant pleaded the general issue with a notice that it would show upon the trial that the plaintiff, contrary to the terms of the application and policy, had no watchman on duty on the premises at the time, although the store of the plaintiffs was closed and no one was working therein, and that plaintiffs, after the issuing of said policy, never had a watchman during the day time on Sundays, although there was no work done in said building after six o'clock upon Saturday evenings, and that had such a watchman been employed little or no damage would have been caused to the plaintiff's stock.

The defendant pleaded the general issue.

The verdict of the jury was that the

"defendant did undertake and promise in manner and form as the said plaintiffs hath in their declaration in this cause complained against it, and they assess the damages of the plaintiffs on account of the premises at the sum of Twelve thousand and five and 59-100 dollars ($12,005.59)."

34 Upon this verdict judgment was entered on January 12th, 1898, that the plaintiffs

"do recover against the said defendant their damages aforesaid by the jurors assessed, together with their costs and charges by them about their suit in this behalf expended to be taxed."

The total amount of the said judgment, including costs, was, as stated in the Twenty-fourth Finding of the Referee, $12,459.26.

Upon a writ of error to the United States Circuit Court of Appeals, the judgment was on or about May 18th, 1898, affirmed with costs.

JAMES E. MCKAY, called as a witness by plaintiff, being first duly sworn, testified as follows:

Direct examination:

I am a steam engineer. In July, 1897, I was employed as engineer in a building next to the building of Burnham, Stoepel & Company, and that occupied by the Peerless Company. Bates Street was between them. I was on duty on the 4th of July, 1897, in the afternoon. I discovered water flowing from the fourth story window of the Peerless Company's building to the sidewalk. It was about two o'clock, I think. I notified the notification company through the telephone and the Fire Department later on. It didn't come at first. Then I sent a second communication, and then they came. They claimed they had nothing to do with the water, I should notify the water board, that they had the shutting off of the water to attend to. The Fire Department arrived there, I think, between 4 and 5 in the afternoon. In the meantime the water was running out of the

35 building, I presume, all the time. I saw no one in the building from the time I first saw the water, about 2 o'clock, until the department came. I went off duty at 6 P. M. and then went into the Peerless building. There was water all over the ground floor. I did not go upstairs. I seen the goods was all dripping with water on them, too.

PETER R. GARR, called by the plaintiff, being duly sworn, testified as follows:

I was captain of the company of the City Fire Department of Detroit, stationed at Wayne and Larned Streets. On the 4th of July, 1897, I was called on the afternoon of that day to a store on Larned Street that was occupied by Burnham, Stoepel & Company. I didn't find any fire. I found water running all over from the second floor over the window caps and door frames, and raised a ladder and broke in the window and investigated, and on the top floor in the skylight I found a sprinkler head running. That head was part of the sprinkler system in the building. The water was coming out of the head, going upwards and striking the skylight and dropping down. We

shut the sprinkler system off from that floor. There is a valve, which is almost to the rear on the west side of the building, up next the ceiling, that closed that off. The water stopped very shortly after. I found any amount of water in the building. The goods on the first and second floor that were in boxes, actually the paper boxes were melting and drooping down from the water. I did not find water coming from any other place except from this head in the skylight.

36 SIEGMOND SIMON, called by the plaintiff, being duly sworn, as hereinafter certified, and being orally examined by counsel, deposes and says as follows:

Direct examination:

I reside in Detroit. I manufacture men's shirts, pants, overalls, &c. In May, 1896, I occupied 19 and 21 Larned Street, belonging to the Bagley estate. I knew nothing about the working of the sprinkler system that was installed there. The 4th of July, 1897, was on Sunday. I think about 4 o'clock somebody telephoned that our stores were on fire. Well, I thought that could not be, because we did not have anything to create any fire in our store; and I tried to catch a car, it was so hot; but I had my umbrella with me, and I ran down as fast as I could. There was no heating apparatus in that building; no fire in it whatever; all comes from the corner, from Burnham, Stoepel's corner. We get our heat, power and light from Burnham, Stoepel & Co. When I came to the store I saw the fire department there, and they had to go in through the upper windows. I opened the door with my key, and I came in there, and I had a new umbrella I bought a few days before that, and I had it open on account of the water, and smashed it all to pieces, the water came down with such power. The water was dropping on every floor, from the fifth floor down on every floor; it was pouring, you might say, coming from the ceilings and through the stairs. When I came, the water from the sprinkler was shut off, but so much water had accumulated that it came down all the time. There are in the building five floors and basement. Above that is the roof of the building with a large skylight running from east to west. It is about half the width of the store, about 20 feet. It was about 12 or 14 feet wide.

37 There wasn't a floor where the goods wasn't damaged, piles fallen over, and boxes smashed to pieces from the soaking of the water, and everything damaged that it came across. The water spread all over the store. There is on each end of the skylight a little wooden door, which we can open in case of having ventilation on each side in the gable ends of the skylight, east and west. It is a swinging sash opened from the floor below, I think by means of a string. Right above that there are round iron ventilators, which can also be turned to leave in the air, or close it up, regular ventilators. In the winter they are closed. In the summer they are frequently closed when we expect a storm, the iron ones. The swinging windows are always closed at night. The iron ventilators in the summer we leave open. That day I think they were open. I could not state positively. On Monday, the 5th, I went into the skylight.

Part of the sprinkler apparatus was in the skylight. There was a pipe that went up in there which contained the water I suppose. There were two sprinkler heads located on top of the pipe, screwed in, I should think, about three feet apart, somewhere along there. One was on the east side and the other was on the west side. I noticed that in one of the heads in the skylight when I went up there on Monday after the accident, the part which held the water, the upper part, was all out. It is the part which stops the water from coming out. That was gone.

Q. What instructions, if any, were given to you by the persons who installed the sprinkler system, as to the working of this device—the sprinkling device?

Mr. OLNEY: Objected to as irrelevant.

Objection sustained; exception to plaintiff.

I had no knowledge as to what temperature these sprinkler heads would fuse at. The skylight was in place before the sprink-
38 ler system was installed. There was no changes made in the skylight. There had been no change whatever made in the skylight from the time the sprinkler system was first installed there up to and including the day of this accident.

Q. What instructions were given to you by the persons who installed the sprinkler apparatus, as to what should be done in reference to those ventilators.

Mr. OLNEY: I make the same objection, as irrelevant and incompetent.

Objection sustained; exception to plaintiff.

Cross-examination by Mr. BARNARD:

There was no watchman on the premises during the day time July 4th. The sprinkler system was supplied with an automatic gong. The purpose of that gong was to ring the alarm in the case of an accident to the sprinkler system, I understood; that is, in case one of the sprinkler heads opened, the gong would ring; so I understood afterwards. July 4th, 1897, was a pretty warm day. I don't think it was quite 100, but it was one of our warmest days. One of the warmest days we had during that season or have had since.

WILLIAM SAULSON, called by the plaintiff, being duly sworn, testified as follows:

Direct examination:

I am secretary and treasurer of the Peerless Manufacturing Company. A certain part of this sprinkler system was put into the sky-
39 light in this building. Two sprinkler heads were inserted in that pipe, one at the east and one at the west end. After the accident on the 5th of July, I went up as far as I could go and looked into the skylight. I was climbing up a ladder. About three of the panes of glass, constituting the floor of the skylight, were out. I could see into the skylight through that open space. I then noticed one of the sprinkler heads was off, the west one.

It is admitted that all the sprinkler heads in these skylights were heads which were marked 155, and that meant that they were intended to fuse at about the temperature of 155 degrees Fahrenheit.

To the part of the sprinkler head, marked Exhibit 2, there is attached a memorandum. I signed my name to it at the time it occurred. The memorandum reads:

"Sprinkler head taken from east end of skylight at 31-33 Larned Street east, Peerless Manufacturing Company, at 7.45 P. M., July 10th, 1897, by William Moss, engineer of Burnham, Stoepel & Co., in my presence and handed to me. William Saulson."

The facts stated in that memorandum, signed by me, are correct. This head blew out at the time. A gentleman by the name of Newkirk was taking the temperature. I was up there with him. That temperature was taken, I believe, the following Saturday. The purpose of that was to ascertain the temperature in that skylight during that day, after the factory was closed, and everything in the same way it was at the time the accident occurred. I was present at the time those readings were taken. I was right there with him all the time. While we were up there on that day we heard a little
40 noise there. Newkirk went up, and we found that the other sprinkler head or trigger, or whatever you call it, blew out. I was right there. I didn't go up in the skylight. That head that blew off on July 10th was marked 155. Shortly after this accident I looked at every other sprinkler head in the building for the purpose—at the advice of our attorney—to find out whether they were all marked alike. They were all marked "155." The heads in the cellar or basement were marked with the same number as those in the skylight. No changes had been made in this skylight from the time prior to the time when the sprinkler system was installed to the time of the accident. The skylight has two small ventilators, and two sash windows where it opened sideways. The ventilators were over the sash. On the 4th of July they were open. They were never closed unless in extreme cold weather in the winter.

Cross-examination:

This system was provided with a gong or alarm—pretty good-sized gong—close to the front door. There was no watchman inside the building at the time the accident happened. At the time the sprinkler system was installed, I think, there was two panes of glass out of the skylight floor; and when they put in the sprinkler system, I think, they took out another pane in order to get that pipe in there. The two windows at each end of the skylight, the swinging windows, I found closed on Monday morning. I assume that they were closed during July 4th. My orders were to close them. In case of a rainstorm it would come right in. They are regular directions. When they leave the factory, that the windows, not the ventilators, the windows shall be closed. The ventilators were always left
41 open, but the windows were closed when we were out of there.

Redirect examination:

On the 10th day of July, 1897, when certain observations were being taken in the skylight, the ventilating pipes of the skylight were open. They were open all the time.

FREDERICK J. RHEINSTEIN, being first duly sworn, testified as follows:

I am employed by The Peerless Company in July, 1897. I remember the bursting of the fire extinguisher apparatus July 4th. I had charge of the machinery on the fifth floor. Stopped work in the building Saturday noon, July 3rd. The weather on July 4th was very hot. I never knew of any hotter day in Detroit.

ANDREW PHILLIPS, being first duly sworn, testified as follows:

Direct examination:

I was watchman at Burnham, Stoepel & Co.'s in July, 1897. I was there during the night from 6 o'clock at night to 7 o'clock next morning. Those were my hours at the time the accident occurred. That Sunday evening I remember I got to the store about a quarter to six. I noticed the firemen at the Peerless Building. They were sweeping water out on to the sidewalk. That was adjoining ours, in the same building. I at once made tracks for my own place as quick as I could. There was nobody in Burnham, Stoepel &
42 Company when I got there. I unlocked the door and went in. I found the water was coming right down through the ceiling on that floor, right on the goods on the first floor. It seemed to me almost just like the drops of a thunder shower, the way the water was falling, large drops. I should say there was one or two inches of water on the floor in a great many places where the floor was slightly bagged and held the water. The condition of the next floor above was just the same. Right under where the leakage was, there was water lying on the floors. The floors were not dead level, and in some places they would hold a little water. All the floors in the building on that side were wet to the front end, to the Larned Street end. It was back as far as the staircases, too. On those floors the goods were wet and on the floor where they have the box goods, the piles of boxes were all melted and crumbled together and fallen together. I went right up on the fifth floor. I had to discover where the leak was. I didn't know where it was. I found the water coming from the skylight. There are two skylights in that building. Where the leakage took place was the easterly skylight. I went to the valve at once and I shut the main valve which shuts off all the water on that branch, including the water in the skylight. Then I opened the relief valve which drains all the pipes. After I shut off that valve the water ceased coming from the skylight. There was no water there in that skylight, except the water that is conveyed there by the sprinkler system. The water cannot escape from the part of the sprinkler system that is in the skylight except through

these heads that were up there, unless the pipe was burst through freezing.

Cross-examination:

This sprinkler system is provided with a gong, or alarm, down on the first floor, where I am supposed to be most of my time, where I can hear it. The gong was ringing on the 4th of July, when I arrived, at a quarter to six, or thereabouts; ringing loud
43 enough to be heard easy. If anyone had been on the premises at the time the gong first sounded, the flow of water could have been turned off at once, so there would not have been any serious damage; because I had a burst once, through freezing, down in the basement. I was on the first floor when the gong went off, and I heard the pipe go up in the basement. I ran down there, and turned it off; and I do not believe there was a pailful of water to mop up. If I had been on the premises on July 4, 1897, at the time the pipe burst, I would have been able easily to have turned the flow of water off at once. It would just have taken me time to go upstairs; that would be all; because we have everything handy—ladders and everything—reaching up to the valve. There was no day watchman there on July 4, 1897.

Redirect examination:

I don't know under what circumstances the water is supposed to escape from the sprinkler system short of the melting of one of those heads. They give way at a certain degree of heat—in case of any fire, open. They are not intended to go off when there is no fire. I saw no evidences of fire at Burnham, Stoepel's on that day. There had been no fire in the fifth floor of that building on that day.

Recross-examination:

No one relieved me when I went away in the morning, and no one there when I arrived there in the evening.

FREDERICK C. STOEPEL, being duly sworn, testified as follows:

I was a member of the firm of Burnham, Stoepel & Co. in 1896 and 1897. We entered into possession of the premises about
44 the 1st of July, 1896. The sprinkler system was not complete when we moved in. It was afterwards completed. Neither our firm nor I had anything to do with the installation in any way, or controlled it or gave any direction about it. The heads and the system in those skylights were in the same condition on the 4th of July, 1897, so far as our connection was concerned, as they had been when they were installed. On July 4th, 1897, I was called in by telephone in the evening. I found the store and goods when I arrived there that evening in a deplorable condition. I found evidence of water having damaged goods there on all the floors in the building. The damaged goods were in that section of the building under the easterly skylight. The space on each floor where I found soaking and wetting, was 40 to 50 feet wide, and the length of the building was 120 feet; and it extended nearly half of the building.

The stock which was stored on those portions of the different floors was a general stock of dry goods, consisting of men's and women's made-up underwear, hosiery, linens, white goods, notions, prints, ginghams and other goods of that nature.

Cross-examination:

There was no watchman on the premises July 4 during the day. The sprinkler system was provided with a gong, or alarm; a large gong; one that can be heard all over the building. The purpose of the gong is to ring in case of any accident.

45 NORMAN B. CONGER, being duly sworn, testified as follows:

Direct examination:

I am inspector of the U. S. Weather Bureau, in charge of the Detroit office. I was in charge from 1895 until 1900—March, 1900—and then from April 1st, 1901, to the present date. I keep in my office a record of temperature. The automatic instrument that records temperature, records the temperature every hour and every minute during the day. The instruments were placed on the roof of the Union Trust Building in July, 1897. That is two blocks from the Burnham, Stoepel & Peerless Manufacturing Company's Building, corner of Larned and Bates Streets. I turn to the record of temperature in Detroit on July 4th, 1897. Those records are all taken on Eastern standard time, which is thirty-two minutes faster than local time. Local time, the observations recorded here would be at 10.28, 11.28, 12.28, etc., for our hours here. Commencing at 10 A. M., which is 9.28 local time, it was 87; 88 at 11; noon, 90; 1 P. M., 91; 2 P. M., 93; 3 P. M., 94; 4 P. M., 94; 5 P. M., 94; 6 P. M., 94.

The records on July 10th, 1897, are: Ten A. M., Eastern standard time, 88; 11 A. M., 91; noon, 91; 1, 92; 2, 92; 3, 93; 4, 93; 5, 93; 6, 92.

The temperatures on July 1st, 1901, were: Ten A. M., Eastern standard time, 88; 11 A. M., 90; noon, 92; 1 P. M., 92; 2 P. M., 93; 3 P. M., 93; 4 P. M., 93; 5 P. M., 93; 6 P. M., 94.

The temperatures on July 2d, 1901, were: Ten A. M., Eastern standard time, 78; 11 A. M., 80; noon, 83; 1 P. M., 86; 2 P. M., 87; 3 P. M., 88; 4 P. M., 89; 5 P. M., 88; 6 P. M., 80.

The temperatures on July 5th, 1901, were: Ten A. M., Eastern standard time, 75; 11, 76; noon, 78; 1 P. M., 82; 2 P. M., 84; 3 P. M., 86; 4 P. M., 88; 5 P. M., 87; 6 P. M., 87.

46 The temperatures on July 6th, 1901, were: Ten A. M., Eastern standard time, 73; 11, 75; 12, 79; 1, 82; 2, 82; 3, 84; 4, 84; 5, 83; 6, 82.

The temperatures on July 5th, 1897, were: Ten A. M., Eastern standard time, 85; 11 A. M., 86; noon, 88; 1 P. M., 90; 2 P. M., 83; 3 P. M., 86; 4 P. M., 77; 5 P. M., 80; 6 P. M., 84.

Those readings were taken with a thermometer in a lattice shelter, through which the air circulates freely, not exposed to the direct rays of the sun, on the roof of the Union Trust Building, fifteen

feet above the roof. In 1901 the instrument shelter was ten inches lower than it was in 1897; but, so far as conditions were, they were practically the same. The purpose of having a shelter above the roof of the building is to protect the instruments from radiation of the building, the object being to have the temperatures, so near the actual temperatures here, with the auxiliary influences taken out, such as direct rays of the sun, the radiation of the building and from surrounding objects. On July 4th, 1897, there was 100 per cent. of sunshine; on July 5th, 1897, 79 per cent.; on July 10th, 1897, 78 per cent. On July 5th, 1897, it was cloudy in the morning, and then from 2 P. M. until 5 P. M. Eastern standard time, it was partly cloudy. That is, in the hour from 2 to 3 there was 5-10 sunshine; and 4-10 in the hour from 3 to 4; and 6-10 from 4 to 5; and 8-10 from 5 to 6 P. M. On July 10th, 1897, there was 78 per cent. of sunshine, but it was cloudy in the morning. The sun was obscured in the morning and in the evening. It was clear up until 5 P. M. That 78 per cent. means that the possible sunshine was 15 1-10 hours, and there was 11 8-10 hours of sunshine. That is 78 per cent. of the possible amount that could occur that day; that is, between sunrise and sunset. July 1st, 1901, was practically clear. The sunrise was clear and the sunset was cloudy. There was 88 per
47 cent. of possible sunshine during the day; and the record indicates between the hours of 9 A. M. and 5 P. M. there was the total amount. At 6 P. M. there was 8-10 of an hour at which the sun was shining. On July 2nd, 1901, there was 61 per cent. of possible sunshine. The sunrise was cloudy and the sunset was cloudy. Between the hours of 9 and 10 there was 8-10, and between the hours of 10 and 11 there was 8-10. That is from the beginning of the eleventh hour until the completion of the fourth hour in the afternoon. The sun was shining during that entire period. Between the hours of 4 and 5 P. M. there was nearly 6-10 of an hour. On July 5th, 1901, the total percentage was 62 up until the noon hour. Between the hours of 9 and 10 there was 3-10 of an hour. Between 10 and 11, 7-10 of an hour. Between 11 and 12, 9-10, and then from the beginning of the noon hour until 6 P. M. the sun was shining continuously, enough to operate the instrument. The sunset was cloudy.

On July 6th, 1901, there was 80 per cent. of possible sunshine. Between the hours of 9 and 10 there was 9-10 sunshine. At the beginning of the 10th hour until the close of the sixth hour, the sun was shining continuously. The sunrise was cloudy and the sunset was cloudy.

During the period of time which I have been connected with the Weather Bureau of Detroit I have had under my observation the maximum temperature during the summer season in Detroit. I would say that 94 degrees, which is the highest recorded point which the temperature reached in my shelter on any of the days about which I have been testifying, w[illegible] not an unusual or extraordinary temperature.

We usually have temperature ranging round about from 90 to 96 every summer, under ordinary circumstances. The highest temperature we have had recorded here is 101.

48 WILLIAM S. CONANT, being duly sworn, testified as follows:

I have lived in Detroit since February 1st, 1895. I am a consulting electrical and mechanical engineer. I am a graduate of Princeton University. I took both the Arts course and Engineering course subseqtuently, with degrees in both courses. I was associated in Detroit in my business as engineer with Jesse M. Smith.

I am familiar with the sprinkling system that was in the Bagley Building, so-called, at the corner of Larned and Bates Streets, in Detroit, in July, 1897. It is connected to two pressure tanks, and one gravity tank located in the house on the roof; and the piping is connected with suitable valves and mains, and the sprinkler heads located in the various floors. The water runs from those tanks through the system of pipes, which are in large part located underneath the ceiling of the various floors, in such a way as to enable the heads, if the fusing metal goes away, to distribute the water over the floors immediately below the respective heads. They run from north to south, which is lengthwise of the building, with certain cross connections. The system is connected with the city water. These pipes are fitted up with so-called sprinkler heads, about ten feet apart, centre to centre. They project upwards. The figures 155 and 286, stamped on different heads, are intended to show the number of degrees Fahrenheit, at which the heads are supposed to be fused upon the application of heat. The head is composed of a brass casting, forming a yoke; in this brass casting is set a sheet metal diaphra-m in such a position as to receive a hemispherical glass valve. I might call it a plug. That plug is placed over the hole in the diaphra-m. It is kept in place by means of a sheet metal cap; which cap is held down by a hexagonal
49 piece of thin metal in a vertical position. It may be called a key. The key is held in place by another small piece of metal, which I should call the trigger, and which is fastened to the vertical piece which I refer to as the key, by a metal alloy. The purpose of the metal alloy is to hold the parts, which I have called the key and trigger, to the hexagonal piece in such a position that when fused by heat the three parts will fly apart under the application of this heat and release the plug or valve, allowing the water to be thrown upward against the fluted piece of metal, attached to the top of the yoke, and which I call the umbrella or distributor. The glass plug which closes the orifice through which the water comes, is held in place by means of pressure which is obtained by tightly inserting the other parts which I have mentioned between the top of the yoke and the diaphra-m. The purpose of using fusible alloy is to obtain means for automatic release of the several parts under the application of a definite degree of temperature. When the temperature is high enough the fusible alloy begins to lose its adhesive strength and melts in part, and the pieces pull apart under pressure of the spring connection on the diaphra-m, and of the water behind the plug or valve. That releases the water and permits it to flow. I have measured the skylight over that part of the building which is occupied by the Peerless Company and also the skylight

over that part which is occupied by Burnham, Stoepel & Co. The construction of the two skylights referred to, is substantially alike, and consists of wooden framework setting above the level of the inclined gravel roof in such a way as to support panes of heavy cathedral glass on an incline greater than that of the roof, and enclosing between these glass and other glass panes, set nearly on a horizontal, a cubic space in which, on my first examination of the Peerless skylight, I found parts of two of the Grinnell
50 sprinkler heads. The skylight in the Peerless Company is set crosswise of the building, the length of which runs from east to west. The length of the Peerless skylight over all is 20 feet 4 inches. The inside dimensions are approximately 11 feet 8 inches, by 19 feet 10 inches. It has a floor composed of three rows of panes of glass substantially on the same level as the ceiling of the fifth floor of the building. The distance from the floor of the skylight to the apex of the roof, inside measurement, is about 4 feet 3 inches. These measurements I believe to be thoroughly accurate, and certainly within a few inches. For ventilators the skylight has two end windows, one at each end, each measuring 22 inches by 26 inches. Also above these windows cast iron grating registers, one above each end of the window, 10 inches in diameter. They admit of the free passage of air through and to the skylight. They may be opened or closed at will. The Burnham-Stoepel skylight is the same width as the Peerless Manufacturing Company's skylight, but is 1 foot 10 inches shorter. The height from the lower panes of glass to the apex in the Burnham-Stoepel skylight measures 4 feet 6 inches, instead of the 4 feet 3 inches in the Peerless. There are two skylights in the Burnham-Stoepel Building. I am testifying with regard to the easterly one. Part of the sprinkler system extended into the Peerless skylight in July, 1897. There was a pipe through the second pane from the west upward to an L horizontal, nearly under the ridgepole of the skylight eastward; on which horizontal section were located two Grinnell heads, about ten feet apart. They projected upwards. Their openings were about five inches below the bottom of the ridgepole, where the slanting sides of the roof meet above.

In the Burnham-Stoepel skylight there are no small rectangular windows, such as I have described in detail in the Peerless
51 Manufacturing Company's skylight; but the iron grill work registers and the ventilating ducts leading therefrom are similar. As to dimensions, there is one less row of lights in both the lower and upper panes lengthwise in the Burnham-Stoepel skylight. The ventilators in the two skylights in each case consist of ordinary weather hoods or cowls; the purpose of which was to enable the heated air to be carried out of the skylight without rain or snow being allowed to enter the same. The ventilating pipes in the skylights which I examined were open, consisting of 10-inch thin metal pipes, running outward from the registers, and turning upward by means of an L, terminating above in the weather hood named. The weather hood would not prevent the admission or escape of air from the skylight.

On the 9th of July, 1897, when I visited the Peerless establishment, I examined the premises, more particularly the skylight, and discovered that the head in the skylight, located to the west, had fused; and made preparations to take some temperature readings on the following day. I took those readings the next day, the 10th of July, 1897. The first reading was taken at 11.55, local Detroit time. I used what is known as a test thermometer, purchased from L. Black & Co., opticians, in Detroit, calibrated to read degrees Fahrenheit. This thermometer was hung upon the yoke of the sprinkler head which had fused and gone off. The plug or valve, this sheet metal cap, and the three brass stampings had all disappeared.

Q. How did the portion of the head which you saw on the 9th and 10th of July compare with the condition of the head marked Exhibit 2?

A. It was identical in appearance.

The temperatures that were taken there, beginning with 11.55 A. M., on July 10th, were at 11.55, 120 degrees Fahrenheit; 12, noon, 127 degrees; 12.10, 128 degrees; 12.30, 142; 1 o'clock,
52 144; 1.30, 146; 2, 146; 2.30, 145; 3 o'clock, 142; 3.30, 139; 4 o'clock, 133½; 4.30, 129½.

When I went into the skylight at the Peerless Company on July 9th one of the heads had fused. The other head was then apparently intact, the hexagonal piece and the valve being in place. This head, which was intact on July 9th, when I observed it at, say 2.30 o'clock in the afternoon of July 10th, had fused or gone off. I saw two of the parts said to have formed part of this head, which were picked up below the head, and I myself picked up two other parts, which I believe to have belonged to this head. At noon on July 10th this head had been intact. It was stamped 155, 1896. There was no auxiliary or artificial heat in that building, the Peerless part, that I know of. It is heated from the boiler plant of the Burnham-Stoepel end of the building. I took the temperature in the easterly skylight in the Burnham-Stoepel establishment on several dates; July 1st, 2d, 5th and 6th, 1901. There was not then any part of the sprinkler system in the Burnham-Stoepel skylight. The temperatures that I took in the Burnham-Stoepel skylight on the 1st of July, 1901, were at 10.15 A. M., Central standard time, 142 degrees Fahrenheit, and at 1.30 P. M., 145 degrees Fahrenheit. Those are the only two readings I took that day.

On July 2d, 1901, I took a reading at 11 A. M., 140 degrees Fahrenheit.

I took a reading on July 5th, 1901, at 1.15 P. M., 124 degrees; and on July 6th, at 10.15 A. M., 123 degrees. I would say in connection with the last reading, on removing the thermometer to the floor, directly below the skylight, the mercury fell 20 degrees in one minute. The dimensions of the Burnham-Stoepel skylight, which I have given, refer to the times in July, 1901, when these read-
53 ings were taken, and the skylight was constructed in the manner that I have testified to.

It was admitted by both parties that at the time of the accident and at the time of the readings testified to by Mr. Conant were taken,

the windows in the skylights—where there are any windows—were closed, and that these ventilating chimneys were open; and that the roofs of the Peerless and Burnaham-Stoepel Building were what are known as tar and gravel roofs; that is, boards covered with tar paper, then with tar, then with gravel.

It is further admitted that there were thin white cloth curtains, about six in number, about a foot below the glass skylight in the Peerless Manufacturing Company's Building; that they were movable and located so that the sunlight could be shut out, could draw each separately; they were strung on horizontal wires.

JESSE M. SMITH, a witness, called in behalf of the plaintiff, being duly sworn, testified as follows:

I am a mechanical engineer and have been since 1872, now practicing in New York, and formerly in Detroit, from 1880, until I left there in 1898, I followed the regular course in engineering at the Rennsselaer Polytechnic Institute at Troy, New York, and then followed the regular course in engineering at the Central School of Arts and Manufactures in Paris, France. I took my decree as mechanical engineer from that last-named institution in 1872, and began immediately on the practice of my profession upon my return to this country. My partner in Detroit was William S. Conant. I have been acquainted with the so-called Grinnell system of
54 fire extinguishing apparatus for sixteen to eighteen years. I examined the system that was installed in the building occupied by the Peerless Company, first on the 9th of July, 1897, and on the 10th, and on several other days after that. In that system the water will go out when the valve is released from its seat, by melting of the alloy, or by giving way of the alloy under pressure. The valve is under a pressure all the time from behind. The degree of pressure was determined by the height of water in the tank on the roof, which supplied the system; it is also modified by the initial pressure under which the valve is pressed to its seat when the sprinkler head is manufactured. Both of these pressures work in the same direction and tend to open the sprinkler head and force the valve away from its seat. I do not know what the solder is made of that holds these parts together, except in a general way, from what I have learned from published statements in regard to it. I have never made a chemical analysis myself.

Q. Do you know what the effect upon alloys, whatever they may be, in these heads is of a long-continued heatless than the heat at which the alloy is supposed to dissolve, of this Grinnell head, so-called?

A. Yes, I can tell.

Q. Please state?

A. The effect of long-continued heat upon all this class of alloys, of which the fuse metal in the sprinkler head is composed, is to weaken the alloy so as to make it give way at a lower temperature that it otherwise would.

Q. How reliable in practice are the alloys used in sprinkler heads

as to holding or failing to fuse up to the precise point marked on them as the fusing point?

A. All this class of alloys are unreliable as to the exact temperature at which they fuse, and also as to the exact temperature at which they begin to soften and lose their tenacity.

55 Cross-examination:

The thermometer which Mr. Conant, my partner, used in his experiments on the 10th of July, was a regular test thermometer which we had in our office among other test apparatus for making tests. It was probably twelve inches long. It was not white, it was clear glass. The curtains underneath the glass floor of the skylight on the 9th of July were spread out underneath the skylight, protecting the room below from the heat. I do not know how far the mercury bulb of the thermometer was from the sprinkler head. It was a thermometer of glass, with a Fahrenheit scale; no coloring in the glass. There was no back of metal or wood on this thermometer.

GEORGE H. HOPKINS, recalled.

Direct examination:

I know the boiler-room in the Burnham-Stoepel Building. Prior to the accident I had occasion to visit the boiler-room in connection with certain alterations there, practically at all times of the year. I was there in the summer repeatedly. I visited the building on the forenoon of the 6th of July, somewhere about noon; I don't remember the hour, on the 6th of July, 1897. There was a ladder leading to the skylight, and I climbed to the top of the ladder and perhaps half of my body was up in the skylight. It was a bright, sunny day, as I remember. There was a difference in the temperature of the two places—the boiler room and the skylight—which was perceptible to my observation. The skylight was much the warmer. A short time after the accident some person, assuming to represent the defendant, visited Detroit, a Mr. Dawley. I had conversations with him
56 about the accident. In the course of those conversations I made a claim to Mr. Dawley for the damage which the building itself had suffered owing to this flooding.

Q. Did he make an offer for an adjustment of the damages to the building?

DEFENDANT'S COUNSEL: Objected to as incompetent and irrelevant.
Objection sustained; exception to plaintiff.

Q. In consequence of the conversation which you then had with Mr. Dawley, was a sum of money paid to you by the defendant for the damage to the building?

DEFENDANT'S COUNSEL: Objected to as irrelevant and immaterial.
Objection sustained; exception to plaintiff.

Q. At the same time did not only you, but your co-trustee, Mr. Bagley, the plaintiff, have conversations with Mr. Dawley on the subject?

Same objection.
Objection sustained; exception to plaintiff.

Cross-examination:

Q. When were you in the boiler-room? Can you fix any date?
A. I cannot fix any date. I was there frequently during the year, but as to the hour or date I have no memory.

JOHN N. BAGLEY, recalled.

Direct examination:

I met Mr. Dawley, who has been referred to in the testimony of the last witness, upon the occasion of the visit which he made
57 to Detroit immediately after this accident. I went with him to the building.

Q. Upon returning from the building on that occasion did he make a statement to you as to the propriety of placing these 125 heads in the skylights?

DEFENDANT'S COUNSEL: Objected to as incompetent and irrelevant.

Objection sustained; exception to plaintiff.

It is admitted that the Union Trust Building, where the Weather Bureau was in 1897, and is at the present time, is ten stories and attic, practically now an eleven-story building, and is about 550 to 600 feet northwesterly from this building in question.

The plaintiff thereupon rested his case.

The contract between the plaintiff's assignors and the defendant is "Exhibit A," annexed to plaintiff's bill of particulars, and admitted by defendant's answer.

Defendant's counsel then opened the case on behalf of the defendant and to sustain the issues on its part, first read in evidence a stipulation of the parties, as follows:

"It is hereby stipulated by the counsel for the respective parties to the above-entitled cause, subject, however, to all objections which may be made on account of materiality, relevancy or competency of the facts hereinafter stated, that the papers hereto attached, marked "Jardine Exhibit 1," and "Jardine Exhibit 2," are true copies of the original reports made and submitted by Robert Jardine to the Improved Risk Commission, that copies of said report were forwarded by said commission to E. F. Chapman, of Detroit,
58 Mich., who was in the month of October, 1896, and still is, the manager of the Michigan Inspection Bureau; that said report constituted the approval of the said Improved Risk Commission of the installation by the defendant in this case of an automatic sprinkler system in the buildings named in said report, being the same premises mentioned in the complaint in this cause, and being the system installed under and by virtue of the contract involved in this cause; and that at a date later than the date of said report, and some time during the month of October, 1896, the insurance rate upon the said building was materially reduced by the insurers; that said Improved Risk Commission was in 1896 an association of representatives of fire insurance companies, the object of

which was to inspect buildings for the purpose of ascertaining the fire hazard upon them, including the condition and fitness of any sprinkler devices installed in them, in order to aid the insurers in ascertaining the proper rate of insurance to be applied to such buildings."

DEFENDANT'S COUNSEL: I offer in evidence Jardine Exhibit 1, attached to the stipulation which I have just read, and which also has the number 916 printed on it, and which refers to the Burnham-Stoepel Company.

Objected to as irrelevant and incompetent evidence against the plaintiff, no objection being taken to the mode of proof.

Objection overruled; exception.

DEFENDANT'S COUNSEL: I wish to read the following portions of this Exhibit 1 on the record:

59 "Improved Risks Commission,
"Robert Jardine, Inspector,
"Chicago, Illinois.
"Inspected October 8, 1896, by Robert Jardine.
"Inspection Report.
"Survey of Wholesale Dry Goods House.
"Location, North East Corner Bates and
"Larned Streets, Detroit, Michigan.
"Buildings owned by Bagley Estate—occupied by Burn-
"ham, Stoepel & Co.
"1. Name of Sprinkler. 'Grinnell.'
"When September 18, 1896.
"By whom put in. The general Fire Extinguisher Com-
"pany.
"Wet.
"Alarm Valve on Risers. Gongs First Floor. In good order.
"Equipment, in general, excellent.
"Watchman: One night watchman."

Also, from Jardine, Exhibit No. 2, as follows:

DEFENDANT'S COUNSEL: I also offer in evidence Jardine Exhibit No. 2, attached to the stipulation which I have read, which has also printed on it the number 917, and which applies to the Peerless Company's Building, and I wish to read on the record the following portion:

"Improved Risks Commission.
"Robert Jardine, Inspector,
"Chicago, Illinois.
"Inspected October 8, 1896, by Robert Jardine.
"General order, good.
"Watchman: None.
"Watchman acquainted with details of system: No."
"Watchman and watchman's clock recommended.

60 Defendant's counsel, pursuant to a stipulation, read from the direct-examination of Robert Jardine, taken in the suit

in Michigan by the Peerless Company against the Bagley Estate, as a witness on behalf of the Bagley Estate:

I live in Chicago. I have been in the insurance business since 1889. In the years 1896 and 1897 I was inspector for the Improved Risk Commission, representing the stock fire insurance companies. My duties were primarily to inspect all risks that were equipped with automatic sprinklers; also to pass on and test fire pumps, fire hose, approve and test automatic sprinklers and the other devices pertaining to automatic protection against fire. Engaged in the business of inspection for this commission from June 1st, 1891, to 31st of December, 1897. I made a personal inspection of the building owned by the Bagley Estate in Detroit in October, 1896. I found the sprinkler apparatus in good condition and approved it. After my inspection I made to the Improved Risk Commission the reports that have been offered in evidence known as Nos. 916 and 917.

In my business as inspector I have become acquainted with the general character of the devices used by the General Fire Extinguisher Company. The character of those devices is good. No company does any better work. It does about four times more business than any other company. My inspection consisted of first inspecting the building thoroughly; and, second, inspecting the equipment all through to see that the gravity tank and the pressure tank held the desired quantity of water, and also at what pressure the pressure tanks—I mean what pressure of air was in the pressure tanks—then look over the sprinklers and see they were properly placed, and if any sprinklers were missing, in my judgment,
61 to call attention to the contractor, and also to the assured, and to make a minute of it in my report. I recall at the top of the Burnham-Stoepel Building a skylight. I inspected it. If my recollection serves me right, I think there were two heads in that skylight. Possibly there might have been one, but I think two.

Q. Now, from your experience which you have told us of, and your inspection of this particular skylight, will you state whether, in your judgment, it was proper practice to place sprinkler heads in that skylight?

Objected to on the ground the witness has not been shown competent to answer it, and on the ground it is not a subject for expert opinion.

Objection overruled; exception to plaintiff.

A. Yes, sir. I am familiar with the sprinkler heads used by the General Fire Extinguisher Company.

Q. Now, from your knowledge of the head and its composition, will you state what, in your judgment, from your experience, what kind of head, in your judgment, would properly be placed in such a skylight as that of Burnham & Stoepel, taking into account, as you have told us, the object of the installation?

Same objection and ruling; exception to plaintiff.

A. I would say that the sprinkler, having the ordinary alloy for 155 degrees would answer.

Q. Supposing, Mr. Jardine, in inspecting this building, you had

discovered that in the skylight of the Burnham-Stoepel Building a hard head gauged for 286 degrees Fahrenheit had been placed instead of one gauged for 155 degrees Fahrenheit, would such
62 installation, in your judgment, have been proper practice?

A. That depends on conditions.

Q. I speak of this head placed in this particular skylight?

A. Well, I should certainly have ordered it out, from my experience at that time.

Q. Will you state whether or not, in your experience, you have seen hard heads installed in such a skylight as this?

A. I never did.

PLAINTIFF'S COUNSEL: I move to strike out that answer on this ground: That it does not appear that the witness had ever seen a skylight constructed like this, with sprinklers in it or without, or had examined with special reference to that.

Motion denied; exception.

I recall having seen the plans and specifications upon which this work was done. I believe the plan had my approval. I am not positive, however, but that was the invariable custom, to have the plans approved before the work was begun.

The plans and specifications for the work called for the installation of sprinkler heads in this skylight. If I recollect right, I believe they did.

Q. Was such installation in accordance with the usual and ordinary practice of reputable sprinkler companies?

Objected to as being incompetent, and it not being material what was done in other places under other conditions.

Objection overruled; exception to plaintiff.

A. Yes.

The plaintiff's counsel then read as the cross-examination of the witness, the following parts of his said deposition in the former case:

I had before examined a skylight in another building be-
63 fore this time which had pipes in it, in which the pipe and the glass were placed in a practically similar way as that found here; but there was a difference in the Burnham-Stoepel skylight, in that the bottom was enclosed in glass with, I believe, two openings left in there possibly for the circulation of air. The object of having a sprinkler head in the skylight is that the skylight being higher than the roof, that the heat from any fire generated in the building would rise to that point, and therefore the sprinklers in the skylight would open first, before the sprinklers under the ceiling would. The sprinkler heads were made out of brass, with a german silver diaphragm, glass disc, and a little strut, formed of perhaps four pieces. The strut of these heads is soldered with an alloy of low-grade solder, which fuses at 155 or 286 degrees, the difference in the alloy being in a commercial way that 155 degrees heads can be placed in buildings under ordinary temperature. The 286 degrees heads are used in dry kilns, over boilers, and in any other place where there is an extraordinary heat. If the temperature of the atmosphere surround-

ing the head rises to, we will say 155 degrees in the case of the softer head, if the solder head is in good condition, it won't open at 155. It might open at 160. My experience leads me to say that the heads open anywhere from 165 to 185 degrees of heat. If they open much quicker than that it must be on account of extraordinary pressure, or a defective sprinkler head.

Q. Now, Mr. Jardine, upon what do you base the judgment which you have just given us about the proper practice in such a skylight as this?

A. I based the practice of installing the ordinary heads under skylights from the fact that under regular conditions the temperature should be about the same throughout the entire room.

I was in the employment of the fire insurance companies for the ultimate benefit of the fire insurance companies.

64 Q. The easier those sprinkler heads would go off the better?

A. Generally speaking, yes, sir.

Q. Those sprinkler heads were designed not to go off except in case of an incipient fire; is that right?

A. Yes, sir.

Q. In order to be a proper and workable system, the sprinkler head should remain closed under all ordinary conditions and only opened in case of a fire threatening to destroy the building or property; is that right?

A. Yes, sir.

Q. So far as your employers were concerned, it would be no loss to them if the system should go off even when there was no fire?

A. No, sir, there would be no loss at all.

Q. Your duties as inspector for the fire insurance companies was to see that the system was in such condition that it would be likely to go off or would go off in case of a fire and as early after the starting of a fire as possible?

A. Yes, sir.

Q. So that in making your inspection you had, of course, in mind the interests of your fire insurance companies?

A. Yes, sir.

The plans did not show what kind of sprinkler heads were to be located in that skylight; but in approving the plans I had in mind that the sprinkler heads were to have the ordinary amount of alloy throughout. If they had specified the hard heads I would have seen it on the plans, I think, certainly. They would have made a note on their plans that they were to be 286 degrees heads instead of 155, but that is not so. I cannot say there was such a notation as to any of the heads in that building of any kind. I examined in the Burnham-Stoepel skylight the kind of sprinkler heads there; looked at the head, to see that it was 155 degrees. I have a recollection that they were 155 degrees in the Burnham-Stoepel part. I did not examine into the skylight in the Peerless part, beyond the fact I saw there was sprinkler heads in there; but, presuming they were precisely the same kind of heads, I did not take the

65 trouble to put my head and shoulders up in there to examine it. I believe I examined the two skylights with reference to

ventilation. In the Burnham-Stoepel part of the building I only recollect one, and in the Peerless I only recollect one. In the Burnham-Stoepel skylight there was the usual ventilation that is put in all these metal skylights. It consisted of a metal tube coming up at the side and going up above the apex of the skylight. When ventilation there was to the Peerless skylight, I stated before, I did not examine that. I didn't suppose the skylights in those buildings were any different from the other skylights, and possibly on that account I did not give it as close attention as I otherwise would. Whether the ventilation in the two skylights was the same, I can't tell. I didn't look into the Peerless skylight, only with a view to see it was sprinkled and installed right. I recollect getting my head up into the opening in the Burnham-Stoepel Company's part to look at those sprinklers, but I didn't look in the Peerless. I will tell you why: Because, as a general rule, in automatic sprinkler work, say on two floors or three floors that are alike, the work is done precisely the same. The pipe is all cut and the work is done precisely the same way; and therefore after having examined one skylight I had a right to suppose, from the experience I had in inspecting sprinkler equipments, that the same size of head would be in the Peerless as in the Burnham-Stoepel. I could see from the floor whether there were any sprinklers or not in the skylight. I believe there were two openings in the floor of the Burnham-Stoepel skylight, one opening on this side and one on that side. I got up on a ladder and put my head in the flue and examined the heads. I have a distinct recollection of getting on a ladder and putting my head through that glass enclosure. I remember I only put my head in. I believe two of the sprinkler heads were in there.

66 I did not look at both of them. I could only look at one. I did not look at the sprinkler heads over the boilers. I do not know whether there was a soft head or hard head over the boilers.

Q. What difference would it make to you if it was too soft?

A. Not a bit of difference; only this, as a fire insurance company, that a fire might come along when the water was shut off; that is the point.

I presume I examined the sprinkler heads over the boilers, the same as the others.

Q. Now, Mr. Jardine, where, prior to October, 1896, when you made this inspection, was there a skylight fitted up with a sprinkler system exactly like this one?

A. I don't know that I can answer that question.

Q. I ask you if you know any like this one?

A. No, not like that one.

Q. From what knowledge you have of these sprinkler heads would you place a soft head where the temperature, under natural conditions, might go or would go to 135 degrees?

A. I believe I would.

Q. You would do that?

A. Yes, sir, because I would have about 30 degrees difference.

Q. Would you where it would go to 140?

A. Well, that is a debatable question. I have never taken read-

ings from the thermometer of the heat generated in an ordinary skylight under a summer sun; not this one.

Q. You said on your direct-examination that from the experience you had up to that time that, in your judgment, the placing of soft heads was all right in those roofs?

A. It is yet under certain conditions.

Q. Under what conditions? That you want the water to flow?

A. I have in mind a risk in this city that is being installed by another company.

Q. I don't want to go into any case. You said up to that time, from your experience, you thought it was proper. Do you
67 mean to say, with your experience in that building, you would put soft heads of that character in that building again?

A. I would say, under the same conditions, I would not.

Q. Can you say in your conduct of that business that you would take any risk at all in skylights by putting soft heads in?

A. I would consider the conditions, whether soft or hard heads.

Q. Suppose you were installing a system in that building with a skylight; before you ordered the soft head you would want to know the temperature which might be reached on a hot summer's day in the skylight?

A. I don't know that I would.

Q. What is the ordinary temperature in an ordinary skylight on a hot summer's day; do you know, with ordinary ventilation similar to that?

A. I don't suppose it ever gets up to over 110 or 120.

Q. Have you ever taken readings to find out?

A. No, sir.

Q. What is the heat of the summer's sun in the open air on a hot, oppressive day, under the sun; not under the shade?

A. Probably runs about 135 or thereabouts.

Q. You think, then, in the top of a building, with similar ventilation to what you remember in the Burnham-Stoepel in an ordinary skylight, with a floor to it, the heat would be only 110?

A. I think Burnham & Stoepel is not a fair case to cite.

Q. I say not like theirs; not with a floor to the skylight but the ordinary skylight with the same kind of ventilation?

A. With an ordinary skylight in a building where there is good ventilation I would say there would be less heat than there would be outside, on the outside. I am talking of an ordinary skylight in which ordinarily the glass is not under the direct rays of the sun. I think I looked over the equipment twice. Have been in the employment of insurance companies from 1889. I would say there was at least 75 pounds water pressure anyway on the heads in these
68 skylights. There is a sprinkler head made to fuse at about the boiling point of water. I don't know whether it is made now or not, but there was one made, a sprinkler head to fuse at 212, and then the ordinary one at 155 or 163. The Grinnell Company made their sprinkler to fuse at 155 and 286 I believe, while some of the other sprinkler companies made theirs to fuse at 160, 212 and 300. They varied from that, from 165 up to about 260. I said that the 155 usually went off in tests from 165 to 185.

Q. That is where you suddenly turned on the gas and suddenly or quickly produced a heat?

A. Yes, sir.

An ordinary 155 head in a steady temperature of 130 degrees, would not loosen the solder. It is not the fact that ordinary alloy of this kind will soften many degrees before it will melt; for this reason, in my judgment, while the alloy itself will fuse at 155 degrees of heat, still when it comes in contact with a body of metal it takes many more degrees to open. That is the reason why I say any sprinkler head of 155 degrees will not often fuse at that point. It takes 165 to 185 degrees to open it. I never tested these sprinkler heads under a steady heat of 20 degrees below 155 for days, nor to find out whether it would soften and fall apart before it was melted.

JONATHAN C. MELOON, called as a witness in behalf of the defendant, being duly sworn, testified as follows:

Direct examination:

I reside at Providence, Rhode Island. I am a mechanical superintendent of the General Fire Extinguisher Company. I have been for the last ten years. The manufacture of sprinkler heads
69 is under my general superintendence, and has been for the last ten years. With regard to the alloy which is used in the manufacture of these sprinkler heads, I weigh out the solder that goes to make them, personally superintend it. That solder is composed of 50 parts bismuth, 25 parts lead, 13 parts cadmium and 12 parts tin. I weigh them twice and check them and send them to the foreman in the foundry, who melts them down into the solder. Then they are returned back to me, and then I test it to see the melting point. I make at a time 100 pounds of solder.

Q. What do you do to test it?

A. I take a strip of this metal, small piece of it, and submerge it in water and then raise the temperature of the water to the melting point. I find the melting point to be 162 degrees. (Metal sticks shown the witness.) These are our regular solder sticks, ready for use. I delivered some of these solder sticks to Professor Denton, and some to Professor Hallock, within the last few days. About 50,000 sprinkler heads are made out of 100 pounds of solder. I am the only person who weighs out this metal for the purposes of manufacturing into solder, and have been such for the last ten years. After the different parts of the sprinkler heads are machined, they are assembled together. These are all called "Grinnell Sprinklers." We make these heads for different temperatures—for 155 and 286 and 360, and we have made a few 212, but not within the last few years. These sprinkler heads are not manufactured anywhere by our company except at the Providence factory, and the solder is only made there. I have always weighed the solder out for this company, and the Providence Steam and Gas Company which were the original inventors and starters of the business, which was sold out later to this General Fire Extinguisher Company. I have had the superin-

tendence of the manufacture of these sprinkler heads from
70 the time they were put on the market. Within the last few days I delivered to Professors Hallock and Denton a box of 200 of these sprinkler heads, just as they came from the factory, and I delivered them for them to select from. After these sprinkler heads are soldered they are inspected by a man whose duty it is to inspect them to see that they are in workmanlike shape, and then they are taken and carried to a testing apparatus where they are screwed into the pipes and hydraulic pressure of 300 pounds exerted on the valve seat to test them for strength. By the "valve seat," I mean through this opening here, so that the pressure goes in under the valve seat, as it would do if they were put in the sprinkler apparatus; and that pressure is 300 pounds. Then they are taken out, and put on a second time, and tested with air—most of them are; sometimes we test them with water. If the job is going to be for air, we test them with air, at a pressure of 80 pounds, on another apparatus, but in the same way. Then they are taken out, and are ready for shipment. They are shipped packed in crates, which are similar to an egg crate, each sprinkler having a receptacle big enough to hold it without bearing against the next sprinkler, to protect it all around; so that the sprinkler has a little box, just like an egg crate. They do not come in contact with one another. This alloy, and the sprinkler heads, were made in the same way as I have described since 1892; and at all times since I have had charge of that branch; and the sprinkler heads have always been shipped in the same way. In the test I made of the alloy in hot water, it melted at 162 degrees.

To the Referee:

Each sprinkler head is subjected to that test. This system was finished in October, 1896.

71 (By Referee:)

Q. How long before October, 1896, can you tell, was the solder prepared which was used in the sprinkler heads?

A. One hundred pounds of solder would last anywhere from—as we were making them, it would not be over two or three months old. I never found the solder to deteriorate at all by age. It remained constant. I have tested this alloy hundreds of times. I never knew the allow to fuse at less than 155 degrees.

Cross-examination:

In testing solder, we simply take a dish of water and heat it up slowly, having the base of this metal in the water, and when it rises up to its melting point, by having a thermometer resting on it and seeing that it flows around there, looking through the water we read the temperature and see what it melts at. The piece of solder we immerse is about two inches long, about ¼ inch wide, perhaps 1/16 of an inch or so thick. It rests on the bottom of the receptacle. We heat the water up by steam and then remove it from the heat and then put in the piece of solder and watch what happens. We keep

the thermometer out of it until we get it heated up, and then put the thermometer down in and read its temperature, after we think it is about the required temperature. Then we throw in a piece of the solder and see what happens. I have never had occasion to reject any solder that I have made. We have rejected sprinklers. In the mechanical construction, we do not always get perfect castings, and the machining of the parts is not always good. After the parts are assembled, we have rejected the sprinkler heads for mechanical defects.

Q. Sprinkler heads, after the parts are assembled, are never subjected to any heat tests?

A. No, hydraulic test only. We sometimes find that a sprinkler head leaks under the hydraulic tests; but I could not tell off
72 hand what is the percentage of defective ones that are rejected because of a leaky valve.

(By the REFEREE:)

Q. I understand you to say that all the solder that has been used in the manufacture of these heads, since you have been connected with the company, were made by you personally?

A. Personally, yes, sir.

Q. You have measured out the constituents, and made the solder?

A. Yes, sir; the component parts of the solder, after I have weighed them out, are given to the foreman at the foundry. He takes it, and pours it in a clean crucible. He melts the lead and the tin first, which are the highest melting points, and then the bismuth, and the cadmium are put in there, and gradually dissolved, so as to make the mixture; and when it is gradually dissolved, and all melted, it is then poured off into small beakers. The whole 100 pounds are made at one time.

Redirect examination.

The figures "155," and 1896, on the sprinkler heads produced as exhibits in this case, refer—the "155" to the temperature of the sprinkler, and "1896" to the date of its manufacture. I never knew of any of these sprinkler heads being rejected on account of the solder being defective.

WILLIAM HALLOCK, a witness called in behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

I am a professor of physics in Columbia University. I took my degree of Batchelor of Arts from Columbia College in 1879, and studied for three years in the University of Wurzberg in Bavaria, taking my degree of Doctor of Philosophy in 1881. From that time until 1882 I continued my studies at the University of Wurz-
73 berg; from 1882 to 1891 I was physicist on the United States Geological Survey; from 1891 to 1892 I was in charge of the Astral Physical Observatory of the Smithsonian Institution. Since 1892 Professor of Physics of Columbia University, and have

the degrees of A.B. and Ph.D.; the honorary degree of Doctor of Pharmacy from College of Pharmacy at Washington. The study of heat has been a branch of my professional work. I have made the study of metal alloys a special study. I have received from Mr. Meloon, the last witness, some sticks of this solder, and twelve or fourteen sprinkler heads. I have made experiments with them with a view to qualifying myself to testify in this case. I have made tests of this particular alloy within the last few days, with a view of determining its cohesive and tensile strength and at what temperature it would fuse. The particular experiment I have made of it with reference to the strength of the alloy was to bend a strip of the alloy into the form of a loop and clamp the ends of it together so (indicating), forming a ring, then hanging a lead weight, actually of 1 kilo, which would pull with approximately a load of two pounds when submerged in water; this whole arrangement was then hung in a water tank made of tin, of about one gallon capacity, and a thermometer was inserted in the same bath in the immediate neighborhood, practically resting against the strip of alloy. With the apparatus in this shape the temperature was gradually raised by the putting of a Bunsen burner underneath until the temperature approached 150 Fahrenheit, and then the gas was lowered so that the rise in temperature should be only very slight or nearly constant. Under these conditions the temperature rose to 153½, and it remained between that temperature and 155½ to 156 for about fifty minutes.

74 During all this time, of course, the load was upon the strip. At that time in the experiment I was called away and returned an hour later, and the temperature had risen to 161 and the alloy had yielded, dropping away to the bottom of the tank, thus showing as the result of the experiment that the strip of alloy had been able to carry the load of two pounds for fifty minutes between the temperatures of 153 and 156, but finally melted below the temperature of 161 somewhere; of course I am not able to say where, because I was absent. That is the experiment that I performed, particularly with reference to determining the ability of the alloy to hold together, even though subjected to a comparatively long period of temperature, closely below its melting point.

The other tests of the alloy were when the alloy was in place on the sprinkler head itself. I made no special determination other than a repetition of these experiments, giving essentially the same results, showing that the alloy melted somewhere between 155 and 161 or 162. In the water tests a number of them that I made gave way at different temperatures ranging from 159 to 162.

The advantage of trying the experiment in water is that, under those conditions, the sprinkler head and the thermometer, or the alloy and the thermometer, necessarily get their temperature from the water by contact, or what is technically known as "conduction"; and, under those circumstances, if the precaution is taken to change the temperature of the bath slowly, then it is safe to say that within half a degree or so, depending upon the care with which these precautions are carried out, the thermometer, or the sprinkler head, or the alloy, would all have the same temperature in the bath. Hot air,

however, greatly increases the difficulties, because air is a very poor conductor of heat. I tried four of them in the hot air bath,
75 with the same result, that they went off between the temperatures of 159 and 162. I should like to say, as a matter of record, that of course, it will be understood that these temperatures are not supposed to be absolutely correct, within 1-100 of a degree, but within a reasonable amount—perhaps within one-half of a degree. I used part of the time a Fahrenheit thermometer and part of the time a centigrade, but at all the times the centigrade was reduced to Fahrenheit. I used a tested thermometer—a glass tube, with a plain glass bulb. From my experience with this alloy I do not believe that any exposure to a temperature of 146 degrees would lower the melting point of the alloy by one degree. It would tend to soften it, but to an extent not greater than that indicated by the falling of the melting point by one degree.

The lowest temperature at which I was able to melt this alloy was 159. From my experiments I should say that the alloy will not fuse below 155. The points are between 159 and 161.

By the REFEREE:

Q. Supposing it was subjected for an hour or two hours to a temperature of 146; then the temperature went down to normal—70 or 80—would the alloy be weakened by that; or, as it hardened, would it affect its original strength?

A. There are two effects. One is permanent, and one is temporary. The permanent effect is only very slight indeed; the temporary effect is the chief one.

Q. Suppose that process went on for several days during the summer; that is, this sprinkler head being in a skylight where, we will say, the temperature rose in the afternoon, or at midday; and then, of course, it went down at night; would that continued operation tend to weaken the alloy?

A. I think not. If the alloy is subjected to a tempera-
76 ture of 146 degrees, for example, for two or three hours, then it has practically made all the change it is going to under those conditions at that temperature, and unless it is heated above that, there is no more permanent change.

Q. It would not weaken it, then, to-morrow, to go up to 146 again?

A. No, sir. It is just like tempered steel. If we anneal steel up to a certain temperature, and anneal it perfectly at that temperature, it does not make any difference how many times up and down you heat it.

By Mr. OLNEY:

Q. That illustrates the case of this alloy?

A. Yes.

In view of the compound lever that the pressure in the pipes is compelled to work against in this mechanism, and in view of what has already been said of the behavior of alloys at a temperature of 146, I do not believe that the effect of the water pressure in the pipe

would appreciably affect the temperature at which the head would give way.

Q. Assuming that in this skylight, a model of which you have seen, the temperature was taken by Mr. Conant, whose deposition has been read by the plaintiff, under the following circumstances, the outside temperature being about the same as on the day of the accident, the thermometer used by Mr. Conant being a test thermometer, clear glass tube, with no colored glass, with no back to it, about twelve inches long, and assuming that it was hung upon the yoke of the head that burst on the 4th of July, some eight feet from a head which had not exploded at the time the thermometer was hung, the unexploded head being arranged upon the top of the pipe and about eight feet from the exploded head, and that the thermometer showed the temperature to be 146 Fahrenheit; does that
77 reading of that thermometer at 146 indicate what the temperature was upon the solder in the unexploded head?

Objected to as incompetent and irrelevant.

Objection overruled; exception.

A. The temperature of the solder could not be inferred from the temperature of the thermometer eight feet distant, particularly if the sun was shining on the skylight at the time that the experiment was made. The reasons are that the currents of air that are certain to exist in the skylight would be different in temperature in different parts of the skylight, and, as I said before, if the sun were shining, the absorption by the head of the heat from the sun might be entirely different from the absorption of the same radiant heat by the bulb of the thermometer. The differences of temperature would fall in those two classes, I think, namely, the differences in the temperature of the air currents in different parts of the skylight, and the differences due to the different absorption of the two objects in question, to wit: the sprinkler head and the bulb of the thermometer. The chief reason would be that the radiant heat falling with the light of the sun upon the two, namely, the alloy on the head and the bright bulb of the thermometer, would be absorbed by these two objects to different extents, and on that account the alloy, which being dull and not of the same degree of brilliancy and reflecting power as the mercury in the bulb of the thermometer, would absorb more of the radiant heat than the bright bulb of the thermometer, and consequently tend to stand higher in temperature than the bulb of the thermometer. This is a principle recognized in science. It is commonly expressed in every day experience by the statement that dark objects attract the heat, the dark objects are warmer than bright
78 objects. It is the common experience that snow with dirt upon it is sure to melt when the temperatures are such that in the shadow of a building the dirty snow may remain frozen; but where it is exposed to the sunlight, the dirty snow absorbs the heat which falls upon it; whereas, the clean, bright snow, which may be right alongside of it, reflects the heat, and does not melt. I have made experiments with the view of determining what the difference in the case of these sprinkler heads and the thermometer bulb was.

Q. Please state what those experiments have been?

A. For example, I took a sprinkler head, and placing the thermometer bulb against the back of the strut, upon the alloy, in that position I put the whole head in a thin beaker glass; and near the head, in the same vessel, was an ordinary thermometer, practically identical with the one fastened at the back of the alloy. The bottom of the beaker was covered with cotton, to prevent heating by conduction from the bottom of the vessel; and the top was filled with cotton, to prevent circulation of air. So that, under those circumstances, one thermometer rested against the alloy at the back of the head, in the shade of the strut; the other thermometer hung exposed to the radiations of the source of heat. In this experiment the glass was then placed in the sun, and subjected to the radiations of the sun, in the room where the sun fell through the window glass, and also through the walls of the beaker. They were allowed to stand thus about half an hour, till the temperature indicated by the two thermometers was practically constant. Under these circumstances, the bright bulb of the thermometer by itself in the sunshine indicated a temperature of 110 degrees; and the bulb resting against the alloy at the back of the head, indicated a temperature of 121 degrees Fahrenheit. Another experiment with an electric arc light instead of the sun showed that when the bright bulb ther-
79 mometer after having been exposed to the radiations of the electric arc at a distance of approximately ten inches to one foot for a period of three-quarters of an hour—the bright bulb thermometer read 117.5; the thermometer immersed in the mercury in the exploded head read 125.6; the thermometer against the back of the strut and trigger read 141.8; thus indicating that the thermometer behind the strut piece was 24 degrees above the temperature of the bright bulb thermometer, and the thermometer in the mercury was 8 degrees above the bright bulb thermometer. A repetition of this experiment gave as the temperature of the bright bulb 107.6, in the mercury 123.8, and against the strut 137.8, giving the differences for the trigger and strut in this case 30 degrees, and of the mercury and bright bulb 16 degrees. From my experiments, I believe a long continued heat at less than 155 degrees would not cause the sprinkler head to open. And, under the same conditions, assuming the additional condition of 75 pounds water pressure to the square inch, that would make no difference in my answer as regards the explosion of the sprinkler head.

Q. Are you able to state from your experiments and knowledge as a professor of science and heat, assuming the conditions mentioned by Mr. Conant, that the temperature in the skylight in question was 146 degrees Fahrenheit, are you able to state what the temperature was, in your opinion, upon the alloy in the sprinkler head eight feet away?

A. The only conclusion that could be drawn would be that the temperature of the alloy was higher than that indicated by the bright bulb thermometer in case the sun was shining. From these experiments which I have since made I should say, if it was a bright sunny day, it might be anywhere from 15 to 30 or 40 degrees. That would

be the result of my opinion from these experiments and from
80 my general knowledge of the subject. I don't think it would make any difference with the ease with which the head would go off, whether the solder was put on thick or not, because the pull of the trigger is so very slight here that the determining condition here is practically the area of the second lever, and would be practically independent of the amount of solder on the head.

Q. Would the length of time that would elapse before the head went off be governed at all by the quantity of solder?

A. Only by a very few seconds, I should say, at the most. It would bear upon the matter of the time taken to melt the solder, that it is in contact with a considerable or only a small portion of the other metal, but at least in all the heads that I have examined the whole surface between both levers and the strut piece is completely filled with solder; and under those circumstances the contact between the various parts is so satisfactory that their temperature would change together, and a little more solder, or a little less, would not appreciably affect the condition.

Cross-examination:

Q. Then, if Mr. Conant's thermometer reads 146, you think the temperature of this solder would have been at least 161 and possibly 180?

A. Yes. I understand the sun was shining on that day. It would make no difference with my opinion if I were advised that the glass top to this skylight was made of corrugated glass, what is known as cathedral glass, and not plain glass.

My theory is that this head in controversy here must have been at a higher temperature than 146 on the 4th day of July, the head itself, when it released; and the fact, if it be a fact, that the air temperature in the skylight on that day was 146, is not
81 evidence that the head was not hotter than 146; that is my theory. Judging by my experiments, if exposed to the direct rays of a hot summer sun, where a bright bulb thermometer would show 146 Fahrenheit, the metal parts of the head might reach 160 or even 170.

JAMES E. DENTON, a witness, called in behalf of the defendant, being duly sworn, testified as follows:

Direct examination:

I am a Professor of Engineering at the School of Mechanical Engineering, known as the Stevens Institute of Technology at Hoboken. I have held that position about ten years.

PLAINTIFF'S COUNSEL: We concede he is competent to testify as an expert on this subject.

I received some of these solder sticks from Mr. Meloon, and during the last few days made certain experiments, with a view to testifying on this trial. Of this alloy, as used in this sprinkler, it is not true that repeated applications of temperature would lower the temperature of the sprinkler below 162 degrees.

I state it as a fact that this solder will not fuse at less than 155 degrees under any circumstances, so long as the pressure is kept within the limits. I made experiments with this alloy in water, and also in air.

(Witness then described various experiments he made.)

It is my opinion, that so long as 155 degrees was not reached, that a long-continued temperature of less than 155 degrees
82 would not weaken, or cause this head to burst, and the pressure of the water of 75 pounds to the square inch does not have any appreciable effect in causing the head to burst, as regards changing the temperature at which it bursts.

Assuming that the sprinkler heads in the skylight in question, marked "155," were the same in their manufacture and character as those I have experimented upon, and tested, in my judgment, those sprinkler heads could not have gone off at a temperature less than 155 degrees. My opinion on that question is decided. With respect to Mr. Conant's experiment, assuming that his thermometer hung, as he testified, denoted a temperature of 146 degrees, that would not indicate that the temperature upon the alloy in the sprinkler head was not more than 146 degrees; not with the sun shining in the skylight; it might readily be higher. My reasons for my opinion are because it is well-known that the temperature upon a dark metal object, under the rays of the sun, may be considerably higher than that of any object below it, as this thermometer bulb was. I can coincide with Professor Hallock in his opinion upon those questions. I suspended one of these strips of solder in water, and loaded it, so that the tensile strain upon it was about 24 pounds per square inch. I maintained the temperature at 159 degrees for an hour, and found that it had suffered no weakness or distortion. I slightly raised the temperature from 159 to 161½. Two minutes' continuation of the temperature from 161½ to 162 broke the piece—ruptured the piece. I removed this strip out of the bath, and let it cool at the temperature of the atmosphere; then put it back in the bath, and brought it to a temperature of 147½, and repeated this 40 times. After that I raised the temperature to 162 degrees, and during one minute I raised it to 162¼,
83 when the sample broke; so that the repeated heating and cooling had not affected the strength which it had—162 degrees—in the test, preceding the repeated heating and cooling test.

Cross-examination:

I saw the model of the skylight in Judge Brown's office. I would not be surprised, in a hot summer sun, that the temperature in a skylight like that would rise to 162.

Redirect examination:

All the sprinkler heads I experimented with were marked "155."

Professor HALLOCK, recalled.

Redirect examination by Mr. OLNEY:

Q. Assuming that the sprinkler heads in question in the skylights in the plaintiff's buildings, marked "155," were the same as the sprinkler heads you have made tests of, did they, in your judgment, or could they, in your judgment, have gone off below 155 degrees?

A. No, they could not.

Recross-examination by Mr. ANGELL:

Q. In your judgment, having seen the skylight, and heard the evidence that has been put in here, might the temperature well have reached 162 degrees?

A. I should reply, yes.

84 Professor DENTON, recalled.

Redirect examination:

I made some experiments with these 155-degree sprinkler heads in water. I tested half a dozen heads, taken at random from this box of 200. They ruptured from 161 to 163 degrees. I tested altogether nearly twelve of these heads marked "155."

Defendant rests.

Plaintiff's counsel then read in evidence in rebuttal the deposition of BYRON W. DAWLEY, taken in the Michigan suit:

I live in Chicago. I am the manager of this department of the General Fire Extinguisher Company and have been since 1892. As general manager I have charge of the office and contracting force. I have been in the business ever since Mr. Grinnell has, a matter of twenty-five years or so, as a foreman over men engaged in installation; as superintendent of construction and then as manager. While I was superintendent I had charge of the various forces of men, hiring and discharging men, installations and making plans. I had charge of the mechanical construction of work for eight or ten years. I am familiar with the installation of the sprinkler system in the so-called Burnham-Stoepel Building. The sprinkler head opens when the heat reaches a certain point, and sprays water on the fire. I have made experiments with the Grinnell sprinkler head and tested them. Possibly for corrosion. A sprinkler might be taken from a certain property that we might not think operative, and test it for the purpose of determining whether it was operative or not. In the course of such tests I have become practically
85 acquainted with the temperatures at which our different heads will fuse. In 1897 the heads we were installing were ordinarily the 155 degree and the 286 degree. We had some of higher temperature for extreme places. From my experience I am acquainted with the temperatures at which the head we ordinarily would use would fuse. A so-called soft head will fuse at about 180. The solder itself will fuse at 155. A strip of this solder, submerged

in hot water at 155 will fuse or flow, but attached to the metal it will take a longer time to fuse it. This solder is attached in the actual head to an alloy of copper and nickel, and the close contract between the solder and this alloy in fact raises the fusibility of the solder.

I negotiated and signed the contract with the Bagley estate for the installation of the sprinkler system in the Burnham-Stoepel Building. I did not have general charge or oversight of the installation of the work called for by this contract. It was done through my office. During the installation the other contracting party exercised no supervision over the work and had nothing to do with it. The person that was in immediate charge of the work was our foreman. I had had in my possession the plans and specifications for the work. They were prepared in our office. The Bagley estate had nothing to do with the preparation of the plans. I think the plans provided for sprinkler heads in the skylight, ordinary heads. I last saw the plans in Detroit, at the trial of the Peerless case. They were then produced by counsel. I have no recollection what has become of them since. In my experience in the sprinkler business I have superintended the installing of sprinkler systems where heads were put in skylights. The usual practice in our company and in other reputable companies requires putting heads in skylights. Good practice requires companies to
86 place in skylights, if any are placed there the ordinary 155 degree heads. It is not necessary to use the higher temperature sprinkler. A very hard head in such a place as a skylight would not open as readily as the lower temperature sprinkler. The fire might gain greater headway. In case of a fire the temperature of the upper portion of a building is greater than the lower, and it is desired by sprinkler companies that as soon after a fire starts as possible these heads fuse and let the water out. In my judgment it was proper to place in this Burnham-Stoepel skylight sprinkler heads of the 155 kind. This particular system was provided with an alarm, or gong. The water flowing in the pipe would sound the alarm either from fire or breaking in the pipe. It is run by electric battery. If the water is shut off, it would stop the alarm. Our system is installed in other buildings in Detroit. I have never known a sprinkler head to go off except in this building where it has been placed in the skylight.

Cross-examination by Counsel for Burnham-Stoepel Co.:

I have just said that I hadn't known of a sprinkler head going off in a skylight except in this building. I know that a similar opening of one of the sprinkler heads took place in the part occupied by the Peerless Manufacturing Company on the same day as the Burnham-Stoepel. I was informed of those respective accidents soon after, within a very few days. I attended the trial of the Peerless case against Bagley, I had an attorney with me.

Q. Who was employed by the General Fire Extinguisher Company? (Not answered owing to objection.)

87 The attorney was Mr. Barnard, the same counsel who has just instructed me not to answer your question. This sprinkler system is designed as a protection against fire and under proper and ordinary conditions the sprinkler head is supposed and designed not to open except in case of fire. I did not personally have charge of the locating of the heads in the Burnham-Stoepel Building or the Peerless Building. I did not have anything to do with specifying what sprinkler heads should be used in any particular place in that building. I looked over the building with Mr. Bagley for the purpose of making up our data for the proposition, as to how much we would charge for the work, and that had reference to how many we would put in. In examining the skylight it was for that purpose.

Q. State whether in looking at the skylight it was with reference to fixing what kind of a sprinkler head should be used in it?

A. There was no question about the sprinkler head.

Q. It was not with reference to fixing the kind of sprinkler head?

A. No, sir.

Q. State whether the first time you gave consideration to the question of the kind of sprinkler head, with reference to its fusibility, that should be located in a skylight was immediately after the accident?

A. Yes, sir.

Q. State whether then you ordered in or directed and sent to be put in a 286-head in the skylight?

Objected to as incompetent and irrelevant, because referring to something that happened after the accident, and witness directed not to answer.

Q. Now, Mr. Dawley, you stated in substance that in your opinion it was proper to locate a 155-degree sprinkler head in the place in question. I ask you would you do it again?

Witness directed not to answer.

88 Q. Now, Mr. Witness, would you locate a 155-degree sprinkler head in a place you knew would reach above 135 degrees temperature Fahrenheit?

A. No, sir.

Q. What leeway did you calculate to leave between the temperature which might ordinarily be reached in a place where there was no fire and sprinkler head used?

A. There should be 30 to 40 degrees.

Q. You will admit that in installing this system it is your business to know about what temperature may be reached under ordinary circumstances in a particular place where you are placing sprinkler heads, will you not?

A. We naturally would know. We try to.

Q. You don't depend on the individual who employs you to tell you what kind of a sprinkler head to put in a particular place, do you?

A. There might be cases where a contractor might suggest and we take his advice.

Q. What man in your establishment is there who decides about what kind of sprinkler heads should be used in a particular place?

A. The engineer, who takes the measurement of the building for the purpose of making plans, is the party who would naturally decide that.

I stated that a strip of this solder or alloy will melt or flow at 155 degrees. It flows immediately on being immersed in water at that temperature; that is, without being attached to any other metal. If that metal or solder is subjected to a heat of 155 degrees, no matter what is attached to it, for a sufficient length of time, it might be expected to break.

Q. When you spoke of it not going off in practice until 170 or 180, or something like that, you meant the application of heat for a short time?

A. I refer to a sprinkler head when we are testing them. With a gas stove.

89 Q. Is it true, so far as your experience goes, that the solder will soften at a less degree of temperature naturally than 155, if it is subjected for some considerable number of hours, although it may not melt and flow?

A. A long-continued low heat or heat lower than 155 with a strain would rupture the joint.

In deciding at what degree of temperature a particular sprinkler head would fuse it depends upon a number of different factors or circumstances, including the quantity of solder used, the amount of metal with which the solder is in actual contact, the length of time the high temperature is maintained, the proximity of the solder joint to a large mass of metal, and also to the pressure or strain upon the solder; all those things have to be considered. The pressure from behind on the solder has something to do with it. The amount of solder has a great deal to do with it. Also the volume or size of the other kind of metal with which the solder is in contact. Also the length of time that the heat is applied. It is true that a soft sprinkler head might withstand a temperature close to its fusing point for a short time without breaking and then go off if that same heat were kept on it for a longer time.

Q. Now, you said that sprinkler heads are required in skylights. Is it not true that the sprinkler heads were taken out of this skylight entirely within a month after the accident?

Objected to by defendant, as incompetent, irrelevant, and as happening after the accident.

Witness directed not to answer.

Testimony closed.

Thereafter the Referee made his report in favor of the de-
90 fendant, directing the entry of judgment dismissing the complaint; and before the entry of the judgment upon said report the plaintiff thereupon duly moved, pursuant to the rule of this Court, promulgated February 5th, 1877, for a new trial upon the foregoing case and exceptions. The motion was denied and the plaintiff duly excepted.

And because none of the evidence, rulings and exceptions, and other matters and things above set forth do appear upon the record of said trial, therefore, upon the prayer of the plaintiff, the Referee, who presided at the trial and made the said rulings, hath settled this case and exceptions, which contains all the evidence taken at the trial, and doth hereby order the same to be filed pursuant to the rules and practice of this Court, this 19th day of January, 1906.

CHARLES F. BROWN, *Referee.*

91 United States Circuit Court, Southern District of New York.

JOHN N. BAGLEY
against
THE GENERAL FIRE EXTINGUISHER COMPANY.

To the Circuit Court of the United States for the Southern District of New York:

Pursuant to the Order of this Court, entered herein on the 16th day of January, 1905, referring it to me to hear and determine the Issues in this Action,

I, the Undersigned, as Referee, report as follows:

That, by Consent of Counsel, the Oath of the Referee was waived.

That thereupon a Trial was had, on due Notice to all the parties.

That I was attended upon said Trial by Messrs. Henry B. Closson and A. C. Angell, of Counsel for the Plaintiff; and by Messrs. Peter B. Olney and George Carlton Comstock, of Counsel for the Defendant; and, having heard the allegations and evidence of the parties; and after hearing Counsel for the Plaintiff, and Counsel for the Defendant; and due deliberation having been made, I decide and find as follows:

92 *Findings of Fact.*

First. That at all the times hereinafter mentioned John N. Bagley, Paul F. Bagley, Frances Bagley Brown, Florence Bagley Sherman, Olive Bagley Buttrick, Helen Bagley Anderson, Margaret Bagley Hosmer; and Joseph T. Mason, George H. Hopkins, and John N. Bagley, as Surviving Trustees under the Last Will and Testament of John N. Bagley, Deceased, were the owners and landlords of certain real estate, with the buildings thereon erected, situated in the City of Detroit, in the State of Michigan, and known as Numbers 19 to 33 Larned Street, in said City, managing the said premises under the name and style of "Estate of John J. Bagley."

Second. That at the time of the commencement of this Action the Plaintiff herein, and each one of the aforesaid persons was, and still is a Citizen and Resident of the State of Michigan, excepting the said Olive Bagley Buttrick, who then was, and still is, a Citizen and Resident of the State of Massachusetts; and the said Helen Buttrick Anderson, who then was, and still is, a Resident and Citizen of the State of Colorado; and that at all of said times the Defendant

herein was a Domestic Corporation organized under the Laws of the State of New York, and a Citizen of that State, and a Resident of the Southern District of New York.

Third. That heretofore, and on or about the Twenty-seventh day of May, 1896, the aforesaid persons mentioned in the First Finding of Fact herein, under the said name and style of "Estate of John J. Bagley," made with the Defendant a certain Agreement,
93 or Contract in writing, which was as follows:

"General Fire Extinguisher Company.

"Executive Offices, Providence, R. I.

"CHICAGO, ILL., *April* 20, 1896.

"Proposal for equipping the property of Estate of J. J. Bagley Building, 19 to 33 Larned St., Detroit, Mich., with an approved System of Fire Extinguisher Apparatus.

"The work under this Proposal consists in furnishing and erecting a System of Wet Pipe Grinnell Automatic Sprinklers, including the necessary piping, and starting with the main upright supply pipes, each of which has an Indicator gate and Draw-off Valve. Also such other materials and labor as are described and enumerated in the within specifications.

"All the materials to be first-class, and all work herein specified to be done in a thorough and workmanlike manner, and in conformity with the Improved Risks Commission standard for Automatic Sprinkler Installations.

"It is agreed that space for materials, and facilities for the prosecution of the work should be accorded on the premises, and that the General Fire Extinguisher Company shall have lien upon the materials and equipment until full payment shall have been made therefor, with right to enter upon the premises and remove the same in case of any default in payment. It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party. It is also agreed that any loss or damage by fire which may occur to our materials and equipment while in your premises shall be borne by you.

94 "Our price for the work herein specified will be $4,800.00, forty-eight hundred dollars.

"Should more or less than 1,382 sprinklers be required, they will be charged or credited at $2.60 each. Any additional work or apparatus which may be required, not included in our specification, shall be supplied by you, or if by us, at prices agreed upon. If delay on your part in supplying such additional work or apparatus causes us additional expense, you are to pay such expense.

"GENERAL FIRE EXTINGUISHER COMPANY,
"By B. W. DAWLEY, *Dept. Agt.*

"We hereby accept the above Proposal and agree to pay the General Fire Extinguisher Company as follows: One-third cash when materials are delivered and work commenced; balance, cash in thirty days after completion of the work herein specified.

(Signed) ESTATE OF JOHN J. BAGLEY.

"*Specification of Work.*

No. 19 to 29 Larned Street.

Story.	Number of rows of sprinklers.	Number of sprinklers in row.	Number of extra sprinklers.	Number of sprinklers in story.	Total.
Base	12	14	...	168	
1st	12	14	...	168	
2d	12	14	...	168	
3d	12	14	...	168	
4th	12	14	...	168	
5th	12	14	...	168	
Under sidewalk.	...	...	...	34	1,042

No. 31 and 33 Larned Street.

Base	4	14	...	60	
1st	4	14	...	56	
2d	4	14	...	56	
3d	4	14	...	56	
4th	4	14	...	56	
5th	4	14	...	56	

95 "In addition to the foregoing number of sprinklers we will furnish:

"Two steel air pressure tanks, each 4,500 gallons total capacity, 5/6" shell, 3/8" head, connected to the system of sprinklers, with the necessary valves, gauges and power air compressor.

"One 12,000 gravity tank, bottom of tank to be placed 15 feet above highest point of roof, and connect same to sprinkler system with necessary valves.

"Three variable Pressure Alarm Valves, each with 8" electric gong, batteries and wiring.

"On each of the risers we place separate cut off valves for each floor.

"We also include the necessary steamer connection.

"Freight and cartage on material and traveling expenses of workmen.

"The estate of J. J. Bagley will furnish supports for pressure and gravity tanks, do all earth, masonry and carpenter work, including housing in of pressure tanks, if same are erected on the roof of building. If pressure tanks are erected on top floor of building no housing will be necessary."

Fourth. That at the time the said Agreement was delivered to the Defendant by the aforesaid "Estate of John J. Bagley," such

delivery was accompanied with a letter, written to the Agent of the Defendant, and signed for the said "Estate of John J. Bagley," by John N. Bagley, as Trustee, reading as follows:

"Estate of John J. Bagley.

"DETROIT, MICH., *May* 27, 1896.

"B. W. Dawley, Department Agent, Chicago.

"DEAR SIR: We inclose you herewith your proposal to do the sprinkler work, signed and accepted by us. We note that in
96 the list of items you anticipate having one 12,000 gallon gravity tank. You remember when here that Mr. Chapman said we would have to have a 15,000 gallon gravity tank. We trust that you have made no mistake, for we expect the system to be approved by the insurance companies before its acceptance. We would like to have this work go forward as soon as possible.

"Respectfully,

"JOHN N. BAGLEY, *Trustee.*"

Fifth. That thereafter, and pursuant to said Agreement, the Defendant did equip the aforesaid property of the said "Estate of John J. Bagley" with an approved system of Fire Extinguisher Apparatus, the work consisting in furnishing and erecting on said property a system of wet pipe Grinnell Automatic Sprinklers, including the necessary piping; and also in supplying such other materials, and performing such labor, as described and enumerated in the Specifications annexed to said Agreement.

Sixth. That in the performance of such work the materials furnished by the Plaintiff were all first class; all the work specified in said Agreement to be done was done by the Defendant in a thorough and workmanlike manner, and in conformity with the Improved Risks Commission's standard for Automatic Sprinkler Installations.

Seventh. That the Improved Risks Commission, referred to in said contract, was an Association of Fire Insurance Companies, one of the objects of which was to inspect buildings in the City of Detroit, for the purpose of ascertaining the fire hazard upon them, including the condition and fitness of any Sprinkler devices installed in them, in order to aid the insurers in ascertaining the proper
97 rate of insurance to be applied to such buildings.

Eighth. That the purpose on the part of the aforesaid "Estate of John J. Bagley," in causing to be installed by the defendant the fire extinguisher apparatus in question in the buildings aforesaid, was to obtain an increased fire protection, and, as a result thereof, a decrease in insurance premiums to be paid by the owners of the buildings or their tenants.

Ninth. That, in order to obtain a reduced rate of insurance, on account of the installation of the system aforesaid, from the insurance companies, it was necessary that the system in question, and its installation, should be inspected and approved by the aforesaid Improved Risks Commission.

Tenth. That before the system in question was installed by the

defendant in the buildings in question, a plan of the equipment, showing the location of the sprinklers throughout the buildings in question, was made by the defendant and submitted to the said Improved Risks Commission, and received their approval.

Eleventh. That such plans showed that sprinkler heads in the system in question were to be located in the skylights in said buildings, and designated that the sprinkler heads so to be located were "ordinary heads," meaning those intended to fuse at 155 degrees Fahrenheit.

Twelfth. That after the said sprinkler system was installed, and before the same was accepted and paid for by the plaintiff's assignors, the said system was inspected by the Improved Risks Commission, which inspection included an examination of the sprinkler heads in the skylights, the manner in which they were placed, and the fact that these were sprinkler heads intended to fuse at 155 degrees Fahrenheit, and said heads were plainly marked "155°" (meaning 155 degrees) Fahrenheit.

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Thirteenth. That because of, and upon said inspection, the said Improved Risks Commission did approve the aforesaid installation of the said sprinkler system by the defendant in the buildings in question; and thereupon, and because of such approval, the insurance rate upon the said buildings and upon the goods therein was materially reduced.

Fourteenth. That it was proper practice at the time to place in the skylights in question sprinkler heads intended to fuse at 155 degrees Fahrenheit; and that had the other sprinkler heads, to wit: those intended to fuse at 286 degrees of Fahrenheit, been placed in the said skylights, the same would have been ordered out by the inspector of the Improved Risks Commission who made the inspection of the said installation for the Improved Risks Commission.

Fifteenth. That thereafter, and on the fourth day of July, 1897, without the existence of any fire in the said buildings, the sprinkler heads, or certain of them, in the said skylight fused, melted, opened and released the water in certain of the pipes and tanks connected with said sprinkler heads, and furnished and erected by the defendant as a part of said system of automatic sprinklers.

Sixteenth. That the reason the said sprinkler heads so fused, as aforesaid, was not because there were any defects in the materials used, or in the installation aforesaid, or because the said sprinkler heads fused at a lesser degree of heat than that at which they were intended to fuse, and at which they were marked to fuse, but because of the extraordinary degree of heat in the skylights at the time of said fusing.

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Seventeenth. That at the time of said fusing the temperature in the said skylights, at the time of the fusing point of said sprinkler heads, reached at least 155 degrees Fahrenheit; that the sprinkler heads which so fused were up to the standards for the sprinkler heads which were marked 155 degrees Fahrenheit, and that the said sprinkler heads did not fuse, as aforesaid, at less than 155 degrees Fahrenheit, the temperature at which they were intended and marked to fuse.

Eighteenth. That the extraordinary temperature in the said skylights at the time of said fusing was caused by the sun's rays shining through the skylights into the space wherein the said sprinkler heads were located, and by lack of draughts of air in said skylights, and by reason of other and extraordinary physical conditions in and about said skylights; and none of said conditions were caused by the defendant, and all of which were without the fault of the defendant.

Nineteenth. That the cause of the fusing of the sprinkler heads aforesaid, and the opening of the same, and the release of the water thereby, considerable water flowed through the said building, and damaged certain stocks of goods and machinery which were therein.

Twentieth. That a portion of the said buildings, known as stores 19 to 29, was then occupied by a firm known as "Burnham, Stoepel & Company;" and another portion of the said buildings,
100 known as Numbers 31 and 33, was then occupied by the Peerless Manufacturing Company, a corporation; and the said buildings, at said time, were then in possession of the said Burnham, Stoepel & Company and the said Peerless Manufacturing Company, as tenants of the said "Estate of John J. Bagley."

Twenty-first. That thereafter the said Peerless Manufacturing Company brought an action in the Circuit Court for the County of Wayne, and State of Michigan, against certain of the aforesaid owners of the said buildings, to recover for the damages to its property contained in said buildings, and caused by the flow of water aforesaid, and that the defendant herein was duly notified of the commencement of the said action, and was requested to defend the same by the said "Estate of John J. Bagley."

Twenty-second. That the said action, however, was defended by the said "Estate of John J. Bagley," and not by the defendant; and the said "Estate of John J. Bagley" contested and defended the said action; but, neverth[illegible]ess, such proceedings were had therein that on or about the twenty-sixth day of February, 1900, a judgment against the said "Estate of John J. Bagley," in the aforesaid action by the Peerless Manufacturing Company, in which the said "Estate of John J. Bagley" were the defendants, was duly rendered for the sum of four thousand six hundred and eighty-six dollars ($4,686) damages, and ninety-five dollars and thirty cents ($95.30) costs, making in all the sum of four thousand six hundred and ninety-six dollars and sixteen cents ($4,696.16).

Twenty-third. That the declaration in said action, wherein the Peerless Manufacturing Company was the plaintiff, was as follows:

"The Peerless Manufacturing Company, a domestic corporation, plaintiff herein, by Maybury & Lucking, its attorneys, com-
101 plains of John N. Bagley, George H. Hopkins, Joseph T. Mason, Florence Bagley Sherman, Frances M. Brown, Paul F. Bagley, Helen Bagley and Olive Bagley Buttrick, defendants herein, of a plea of trespass on the case, the defendants having been heretofore duly summoned to answer this plea.

"1. For that whereas, her-tofore, to wit: on the 4th day of July, A. D. 1897, plaintiff was, and for a number of years prior thereto had been, a domestic corporation, organized and doing business

under the laws of Michigan, and it was then, and prior thereto and has since been engaged in the business in Detroit, Michigan, of manufacturing and selling at wholesale pants and overalls, and other articles of wearing apparel. And the defendants were then, and prior thereto and have since been, the owners and landlords of the five-story and basement brick and stone building known as Nos. 31 and 33 Larned Street, east, Detroit, Michigan. And on, to wit, the 1st day of June, 1896, the plaintiff became tenant of such premises under the defendants as landlords at a large yearly rental to be paid by the plaintiff to the defendants, and it has from thence hitherto remained such tenant, paying rental as aforesaid. And in consideration of plaintiff becoming such tenant under defendants, the defendants undertook to install in the premises a suitable automatic sprinkler system, so called as a protection against fire. And afterwards, to wit: between July 1st and November 1st, 1896, the defendants did erect and put up in said premises an automatic sprinkler system. And it was the duty of the defendants, their agents and servants to have used due care to install a system of such character and so adjusted and arranged in all its parts as not to discharge water therefrom, except when designed, to wit: when a fire
102 occurred; but defendants did not use such care, but they so negligently constructed the system in certain parts thereof that afterwards, to wit: on July 4th, 1897, the fastening of one of the sprinkler heads of said system was melted by the heat of the day and by the sun's rays falling on the same through a window near the sprinkler head in question. And thereupon by such melting and as a consequence thereof the water contained in the pipes was discharged in great volumes through the store and factory of plaintiff and upon the stock of goods and the machinery of plaintiff, thereby ruining large quantities of stock and damaging other large quantities of the stock and the machinery. And it so damaged the stock and machinery as to interrupt the business of plaintiff, for, to wit: thirty days, and caused the plaintiff to lose the sale of large quantities — and forced plaintiff to keep idle large numbers of employees pending the restoration of the business, and such injury to plaintiff was wholly occasioned by the negligence of defendants, and without any negligence on the part of plaintiff, to plaintiff's damage.

"2. And for that whereas, also, the plaintiff in 1896 and 1897 was a Michigan corporation engaged in the business of manufacturing and selling at wholesale shirts, pants and overalls, and other articles of wearing apparel, as alleged in the first count. And the defendants were the owners and landlords of the five-story and basement brick and stone building known as Nos. 31 and 33 Larned Street, east, Detroit, Michigan. And on, to wit: the 1st day of June, 1896, plaintiff became tenant of such premises under the defendants as landlords at a large yearly rental to be paid by the plaintiff to the defendants, and it has from thence hitherto remained such tenant, paying rental as aforesaid. And in consideration of the plaintiff becoming such tenant under the defendants, the defendants
103 undertook to install in the premises a suitable automatic sprinkler system, so called, as a protection against fire. Such

system, in brief, is an arrangement of water pipes (connected with the water pipes of the City of Detroit) distributed through the different floors of the building and fastened near the ceiling and fitted with sprinkler heads, so called, the fastenings of the openings thereof being made of composition designed to fuse or melt at certain high degree of temperature, according to circumstances and surroundings; such degrees of temperature being much higher than would occur at the given place, except in case of an incipient fire at or near the place in question threatening to destroy the premises. Upon such a fire taking place the composition of the sprinkler head fuse melts, thus loosening the fastening of the sprinkler head, which is forced out by the pressure of the water, and the water is thrown in volumes about the place, quenching the flames.

"And afterwards, to wit: between July 1st and November 1st, 1896, the defendants did erect and put up in said premises an automatic sprinkler system. And it was the duty of the defendants, their agents and servants to plaintiff to have used due care to install a system of such character and so adjusted and arranged in all its parts as not to discharge water therefrom, except when designed, to wit: when a fire occurred. And it was their duty in locating the sprinkler heads through the building to locate them in such places and to make them of such materials and manufacture that they would not fuse at a temperature created by the falling of the sun's rays on the same, or from the heat of a summer's day, but only at a much higher temperature. But defendants did not exercise such care, but, on the contrary, plaintiff avers that defendants negligently placed one of said sprinkler heads in and near a certain close,
104 hot, stuffy cupola in the topmost story in said premises, and near the glass sides thereof, and in a location where the rays of the sun would readily fall on the same, and they made such sprinkler head of such composition as to fuse at too low a degree of temperature, to wit: 150 degrees Fahrenheit, and they so negligently constructed such system in and near such cupola and so placed the sprinkler head in the same and negligently made the fuse of such composition as to melt at such a low degree of temperature that afterwards, to wit: on July 4th, 1897, said sprinkler head fuse of said system was melted by the heat of the day and by the sun's rays falling on the same through the window in such cupola as aforesaid, and thereupon by such melting and as a consequence thereof the sprinkler head fastening was forced out and the water in the pipe was thereupon discharged in great volumes through the store and factory of the plaintiff.

"And plaintiff avers that the defendants were careless and negligent in placing such sprinkler head arranged and designed to fuse at, to wit: 150 degrees Fahrenheit, in the place aforesaid, whereas the fuse of a sprinkler head located in such place should have been made of such composition that it would not have melted or fused at a lower degree of temperature than, to wit: 250 degrees, which could readily and easily have been done, and the defendants were negligent in locating the sprinkler head in such close, hot and stuffy cupola, where the sun's rays would fall upon the same. And defendants

well knew or by exercising reasonable diligence and care would have known, that said sprinkler head fastening in said cupola was liable to fuse on any hot day in summer and let the water flood the premises and do great damage to plaintiff's stock and machinery; nevertheless, defendants did negligently and carelessly and recklessly locate said sprinkler head, the fastening of which was designed to fuse at so low a temperature in said close, hot and stuffy cupola. And it was because of such negligence on the part of the defendants that the fuse of said sprinkler head melted as aforesaid and the water was discharged throughout the building. And plaintiff avers that plaintiff was wholly without negligence in the premises. And the plaintiff avers that the water fell in great quantities upon the stock of goods of plaintiff, manufactured and unmanufactured and in process of manufacture, and upon the machinery of plaintiff, thereby ruining and destroying large quantities of stock and damaging other large quantities of the stock and damaging the machinery of plaintiff. And it so damaged the stock and machinery as to interrupt the business of plaintiff for, to wit: thirty days, and such interruptions caused plaintiff to lose the sale of large quantities of merchandise and prevented the manufacture and sale of other large quantities and the filling of large orders and caused the loss of large profits, and plaintiff was obliged to keep idle large numbers of employees pending the restoration of business, paying them their salaries and losing the profits which plaintiff would otherwise have made, to plaintiff's damage.

"3. And for that, whereas, also, the plaintiff in 1896 and 1897, was a Michigan corporation engaged in the manufacture and sale at wholesale of shirts, pants and overalls and other articles of wearing apparel, and the defendants were the owners and landlords of the five-story and basement building known as Nos. 31 and 33 East Larned Street, Detroit, and the plaintiff on, to wit: the 1st day of June, 1896, became the tenant of such premises under the defendants at a large yearly rental to be paid by the plaintiff to the defendants, which rental has been duly paid by the plaintiff to the defendants to the present time, all as set forth in the second count. And in consideration of plaintiff becoming such tenant under defendants, defendants undertook to install in the premises a suitable automatic sprinkler system, so called, as a protection against fire. Such system is an automatic device for extinguishing fires by water of the kind and character described in the second count. And afterwards, to wit: between July 1st and November 1st, 1896, defendants did erect and put up in said premises an automatic sprinkler system and it was the duty of the defendants, their agents, and servants, to plaintiff to have used due care to install a system of such character and so adjusted and arranged in all its parts as not to discharge water therefrom, except when designed, to wit: when a fire occurred. And it was their duty in locating the sprinkler heads through the building to locate them in such places and to make them of such materials and manufacture that they would not fuse at a temperature created by the falling of the sun's rays on same, or from the heat of a summer's day, but only at a much higher temperature,

but defendants did not exercise such care, but on the contrary plaintiff avers that defendants negligently placed one of such sprinkler heads in and near a certain close, hot and stuffy cupola in the topmost story in said premises and near the glass sides thereof, and in a location where the rays of the sun would readily fall on the same, and they made such sprinkler head fuse of such composition as to fuse at too low a degree of temperature, to wit: 150 degrees Fahrenheit, and they so negligently constructed such system in and near such cupola and so placed the sprinkler head in the same and negligently made the fuse of such composition as to melt at such a low degree of temperature that afterwards, to wit: on July 4th, 1897, said sprinkler head fuse of said system was melted
107 by the heat of the day and by the sun's rays falling on the same through the window in such cupola as aforesaid, and thereupon by such melting and as a consequence thereof, the sprinkler head fastening was forced out and the water in the pipes was discharged in great volumes through the store and factory of the plaintiff.

"And plaintiff avers that the defendants were careless and negligent in placing such sprinkler head arranged and designed to fuse at, to wit: 150 degrees Fahrenheit, in the place aforesaid, whereas the fuse of a sprinkler head located in such a place should have been made of such composition that it would not have melted or fused at a lower degree of temperature than, to wit: 250 degrees, which could readily and easily have been done, and the defendants were negligent in locating the sprinkler head in such close, hot and stuffy cupola, where the sun's rays would fall upon the same. And defendants well knew, or by exercising reasonable diligence and care would have known, that said sprinkler head fastening in said cupola was liable to fuse on any hot day in summer and let the water flood the premises and do great damage to plaintiff's stock and machinery; nevertheless defendants did negligently and carelessly and recklessly locate said sprinkler head, the fastening of which was designed to fuse at so low a temperature, in said hot, close and stuffy cupola. And it was because of such negligence on the part of the defendants that the fuse of said sprinkler head melted as aforesaid and the water was discharged through the building.

"And plaintiff avers that it was ignorant of the workings of said sprinkler system and that it trusted entirely to the defendants as to the construction and operation of the same. Said system was designed and intended and supposed to be automatic in char-
108 acter, not requiring any care or attention from the plaintiff, and in fact plaintiff was ignorant of the workings of the system and of the defects and faults therein and of the dangers arising out of such faulty and careless construction aforesaid. And plaintiff avers that it was wholly without any negligence in respect to such accident aforesaid, and that it did not in any wise contribute by its negligence, to the injury and damage so done to the plaintiff's property, as herein set forth.

"And the plaintiff avers that the water fell in great volumes upon the stock of goods of plaintiff, manufactured and unmanufactured

and in process of manufacture, and upon the machinery of the plaintiff, thereby ruining and destroying large quantities of stock and damaging other large quantities of the stock and damaging the machinery of plaintiff. And it so damaged the stock and machinery as to interrupt the business of plaintiff for, to wit: thirty days, and such interruptions caused plaintiff to lose the sale of large quantities of merchandise and prevented the manufacture and sale of other large quantities and the filling of large orders, and caused the loss of large profits, and plaintiff was obliged to keep idle large numbers of employees pending the restoration of the business, paying them their salaries and losing the profits which plaintiff would otherwise have made.

"4. And for that whereas, also, the plaintiff in 1896 and 1897 was a Michigan corporation engaged in the business of manufacturing and selling at wholesale, shirts, pants and overalls and other articles of wearing apparel as alleged in the first count. And the defendants were the owners and landlords of the five-story and basement brick and stone building known as Nos. 31 and 33 East Larned Street, Detroit, Michigan. And on, to wit: the 1st day of June,
109 1896, plaintiff became tenant of such premises under the defendants as landlords at a large yearly rental to be paid by the plaintiff to the defendants, and it has from thence hitherto remained such tenant, paying rental as aforesaid. And in consideration of the plaintiff becoming such tenant under the defendants, the defendants undertook to install in the premises a suitable automatic sprinkler system, so called, as a protection against fire. Such system, in brief, is an arrangement of water pipes (connected with water pipes of the City of Detroit) distributed through the different floors of the building and fastened near the ceiling and fitted with sprinkler heads, so called, the fastenings of the openings thereof being made of a composition designed to fuse or melt at certain high degrees of temperature according to circumstances and surroundings; such degrees of temperature being much higher than would occur at the given place, except in case of an incipient fire at or near the place in question threatening to destroy the premises. Upon such a fire taking place the composition of the sprinkler head fuse melts, thus loosening the fastenings of the sprinkler head which is forced out by the pressure of the water, and the water is thrown in volumes about the place, quenching the flames.

"And afterwards, to wit: between July 1st and November 1st, 1896, the defendant did erect and put up in said premises an automatic sprinkler system. And it was the duty of the defendants, their agents and servants, to plaintiff, to have used due care to install a system of such character and so adjusted and arranged in all its parts as not to discharge water therefrom, except when designed, to wit: When a fire occurred. And it was their duty in locating the sprinkler heads through the building to locate them in such places and to make them of such materials and manufacture that they would not fuse at a temperature naturally created in the
110 particular place by the heat of a summer's day, but only at a much higher temperature. But the defendants did not exer-

cise such care, but on the contrary plaintiff avers that defendants negligently placed one of such sprinkler heads in a certain close, hot and stuffy cupola in the topmost story in said premises and near the glass sides thereof, into which cupola the sun's rays penetrated more or less, creating a heated atmosphere in such close, confined and stuffy place, and they made such sprinkler head fuse of such composition as to fuse at too low a temperature, to wit: 150 degrees Fahrenheit, and they negligently made the same of unreliable fuse metals and made them so negligently that they might fuse at degrees of temperature differing greatly from those designed and sometimes much lower degrees designed, to wit: 150 degrees Fahrenheit, and they so negligently constructed such system in and near such cupola and so placed the sprinkler head in the same and negligently made the fuse of such composition as to melt at such a low degree of temperature that afterwards, to wit: on July 4th, 1897, said sprinkler head fuse of said system was melted by the heat of the day and by the heat created and maintained naturally in such hot, close and stuffy cupola aforesaid, and thereupon by such melting and as a consequence thereof, the sprinkler head fastenings was forced out and the water in the pipes was thereupon discharged in great volumes through the store and factory of the plaintiff.

"And plaintiff avers that the defendants were careless and negligent in placing such sprinkler head arranged and designed to fuse at, to wit: 150 degrees Fahrenheit, in the place aforesaid, whereas the fuse of a sprinkler head located in such a place should have been made of such composition that it would not have melted or fused at a lower degree of temperature than, to wit: 250 degrees,
111 which would readily and easily have been done, and the defendants were negligent in locating such a sprinkler head in such a close, hot and stuffy cu-ola, and under the circumstances and surroundings where the same was located and were negligent in using such fuse metal in question, and were negligent in using the particular sprinkler head made of such fuse metal, in view of the unreliable character of such fuse metal, in such a place as that and under the circumstances aforesaid. And defendants well knew, or by exercising reasonable diligence and care would have known, that said sprinkler head fastening in said above described cupola was liable to fuse on any hot day in summer and let the water flood the premises and do great damage to plaintiff's stock and machinery; nevertheless, did negligently and carelessly and recklessly locate said sprinkler head, the fastening of which was designed to fuse at so low a temperature and made of such unreliable fuse metal, in said close, hot and stuffy cupola. And it was because of such carelessness, negligence, and want of diligence on the part of the defendants that the fuse of said sprinkler head melted as aforesaid and the water was discharged through the building. And plaintiff avers that plaintiff was fully without negligence in the premises. And plaintiff avers that the water fell in great quantities upon the stock of goods of plaintiff, manufactured and unmanufactured, and in process of manufacture, and upon the machinery of plaintiff, thereby ruining and destroying large quantities of stock and damaging other large

quantities of the stock and damaging the machinery of plaintiff. And it so damaged the stock and machinery as to interrupt the business of plaintiff for, to wit: thirty days, and such interruptions caused plaintiff to lose the sale of large quantities of merchandise and prevented the manufacture and sale of other large quantities
112 and the filling of large orders and caused the loss of large profits, and plaintiff was obliged to keep idle large numbers of employees pending the restoration of the business, paying them their salaries and losing the profits which plaintiff would otherwise have made, to plaintiff's damage fifteen thousand dollars, and therefore it brings suit, etc.

To which declaration the aforesaid "Estate of John J. Bagley," the defendants in said Peerless Manufacturing Company Action, pleaded the general issue.

Twenty-fourth. That the aforesaid Burnham, Stoepel & Company were, on the said fourth day of July, 1897, tenants as aforesaid, of the said "Estate of John J. Bagley," and were insured by the United States Casualty Company, an insurance corporation, against such loss or damage to their property, situated in the premises in question, as might be occasioned by the accidental discharge or leakage of the said Automatic Sprinkler System, under a policy which required, among other things, that the said United States Casualty Company should be subrogated, to the extent of its interest, to all claims or rights of the insured thereunder, against any third party, in respect to any loss that might occur under the said policy; and that said insured should execute all papers necessary for this purpose; and that thereafter the said Burnham, Stoepel & Company brought an action in the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, against the said United States Casualty Company to recover the loss and damage to their property, situated on the premises in question, which had been occasioned by the aforesaid flow of water; and that, in such action, such proceedings were had that on or about the twelfth day of January, 1898, a judgment of the said Circuit Court of the
113 United States was rendered, whereby it was adjudged that the defendant therein, the said United States Casualty Company, should pay to the said plaintiffs therein, the said Burnham, Stoepel & Company, the sum of twelve thousand and five dollars and fifty-nine cents ($12,005.59), in satisfaction of the liability of the said United States Casualty Company to the plaintiffs therein, under its said policy for the loss and damage to the property of the said plaintiffs, Burnham, Stoepel & Company, occasioned as aforesaid; and that thereafter, and on or about the sixth day of June, 1898, the said United States Casualty Company paid to Burnham, Stoepel & Company the said sum of twelve thousand and five dollars and fifty-nine cents ($12,005.59), and interest and costs in addition, making in all the sum of twelve thousand four hundred and fifty-nine dollars and twenty-six cents ($12,459.26), in satisfaction of their right of action, under the said policy, for the loss caused to them, as aforesaid, and took from the said Burnham, Stoepel & Company an assignment of their right of action and claims, by reason of the premises,

against the said "Estate of John J. Bagley," as owners of the said premises. That thereafter the said United States Casualty Company brought an action in the Circuit Court for the County of Wayne, and State of Michigan, against the plaintiff"s assignors, to recover for the loss sustained by it, and by the said Burnham, Stoepel & Company, by reason of the flooding, as aforesaid, of the premises occupied by the said Burnham, Stoepel & Company, and its property therein contained.

Twenty-fifth. That the defendant herein, to wit: The General Fire Extinguisher Company, was duly notified of the commencement of said action, and was requested to defend the same by
114 the said "Estate of John J. Bagley." Nevertheless, the said "Estate of John J. Bagley," defended the said action; but despite their defense, such proceedings were therein had that on or about the tenth day of June, 1901, a judgment against the defendants in said action was duly rendered for the sum of thirteen thousand four hundred and forty-four dollars and forty cents ($13,444.40), damages and costs, making in all the sum of thirteen thousand five hundred and forty-eight dollars and ninety-five cents ($13,548.95).

Twenty-sixth. That the declaration in said action brought by the said United States Casualty Company against the said "Estate of John J. Bagley" was, except as to the amount of damages claimed, and the parties, substantially similar, as to the matters in question herein, to the aforesaid declaration in the aforesaid action brought by the said Peerless Manufacturing Company against the said "Estate of John J. Bagley."

To which the defendants in said action pleaded the general issue.

Twenty-seventh. That the aforesaid actions, brought by The Peerless Manufacturing Company and the United States Casualty Company, and the proceedings therein, and judgments obtained thereon, did not adjudicate the liability of the defendant, the General Fire Extinguisher Company, to the plaintiff herein, or to his assignees, the said "Estate of John J. Bagley.'"

Twenty-eighth. That the aforesaid actions, brought by The Peerless Manufacturing Company and the United States Casualty Company, and the proceedings therein, and the judgments obtained thereon, did not construe or adjudicate the agreement in ques-
115 tion, between this defendant and the said "Estate of John J. Bagley," or the acts of the defendant under said agreement.

Twenty-ninth. That thereafter, and on or about the fifteenth day of April, 1901, the said "Estate of John J. Bagley" paid to the said Peerless Manufacturing Company, in satisfaction of the aforesaid judgment and costs, the sum of five thousand and four dollars and six cents ($5,004.06); and also, on the ninth day of December, 1901, to the said United States Casualty Company, in satisfaction of its aforesaid judgment, the sum of thirteen thousand nine hundred and thirty-nine dollars and seventy-two cents ($13,939.72).

Thirtieth. That the said "Estate of John J. Bagley" expended, in and about the defense of the said actions brought by The United States Casualty Company and The Peerless Manufacturing Com-

pany, the sum of two thousand two hundred and seventy-seven dollars and ninety-four cents ($2,277.94), for counsel fees and other necessary expenses; all of which were reasonable and proper in amount; which payments were made on or about the fourteenth day of February, 1902.

Thirty-first. That thereafter, and on or about the fourteenth day of February, 1902, and prior to the commencement of this action, the said "Estate of John J. Bagley," being the persons mentioned in the first finding of fact herein, duly sold, assigned, transferred, and set over to John N. Bagley, the plaintiff herein, all their, his and her claims, demands, actions and causes of action against this defendant, The General Fire Extinguisher Company, arising under or out of the payment of the aforesaid judgments, or because of the premises.

116 *Conclusions of Law.*

1. That the duties and obligations owing in the premises by the defendant to the said "Estate of John J. Bagley" were those duties and obligations expressed in the aforesaid agreement set forth in the third finding of fact herein, and were no other duties or obligations.

2. That the defendant owed no general duty to the said Peerless Manufacturing Company, or to the said Burnham, Stoepel & Company, or to the United States Casualty Company, insurers of the latter; and owed no other duty, or any duty, in respect to the buildings in question, where the sprinkler heads in question were installed, until it entered into the aforesaid agreement set forth in the third finding of fact herein; when it then assumed the obligations expressed in that agrement, upon its part to be fulfilled, and no others.

3. That it performed and fulfilled all of the obligations in said agreement, set forth in the said third finding of fact, on its part to be performed and fulfilled.

4. That the opening of the sp-inkler heads, as found in the fifteenth finding of fact herein, and the flowing of water in consequence thereof, and any damages caused thereby, were not due to, or caused by, any breach of duty on the part of the defendant herein, or because of any failure on the part of the defendant herein to perform the obligations in the aforesaid agreement, expressed in the third finding of fact herein, or imposed upon the defendant by said agreement, or assumed by it thereunder; and were not the fault of, or because of any negligence or breach of warranty on the part of this defendant; and that the defendant is not liable therefor.

117 5. That the judgments rendered against the said "Estate of John J. Bagley," in the Courts of Michigan, or in the said actions brought by the said United States Casualty Company and The Peerless Manufacturing Company, did not adjudicate that the opening of the said sprinkler heads, as found in the fifteenth finding of fact herein, and the flowing of water by reason thereof, and the consequent damages, were the fault of this defendant, or caused by

any breach of duty, or failure to perform and fulfill any of the obligations in the aforesaid agreement expressed, or imposed thereby, upon this defendant, or assumed by it; and did not adjudicate any liability on the part of this defendant to the said "Estate of John J. Bagley," or any others, for the said damages; and did not determine in any respect, that the defendant herein was negligent; and the said judgments are not binding upon The General Fire Extinguisher Company in this action.

6. That the defendant, The General Fire Extinguisher Company, discharged its whole obligation, which it had assumed under the aforesaid agreement in question, and owed no further duty to the plaintiff herein, or to the said "Estate of John J. Bagley," or any others, for the said damages; and said judgments did not determine in any respect, that the defendant herein was negligent; and the said judgments are not binding upon The General Fire Extinguisher Company in this action.

7. That the defendant, The General Fire Extinguisher Company discharged its whole obligation, which it had assumed under the aforesaid agreement in question, and owed no further duty
118 to the plaintiff herein, or to the said "Estate of John J. Bagley," or any of them, or to the tenants in the buildings aforesaid.

8. That the defendant is entitled to judgment herein, dismissing the complaint herein upon the merits, with costs.

I therefore direct that judgment be entered herein, dismissing the complaint herein, upon the merits, with costs.

Dated New York, April 28th, 1905.

(Sgd.) CHARLES F. BROWN, *Referee.*

United States Circuit Court, Southern District of New York.

JOHN N. BAGLEY, Plaintiff,
against
THE GENERAL FIRE EXTINGUISHER COMPANY, Defendant.

Judgment.

The issues of law and fact raised by the pleadings herein, having been refered to Charles F. Brown, Esq., as sole Referee, to hear and determine the same by an order of this Court entered and fild in th office of the Clerk thereof, on the 16th day of January, 1905, and the same having been tried and the said Referee having made his findings herein, and the same having been filed in the office
119 of the Clerk of this Court on the 29th day of April, 1905, directing judgment herein in favor of the defendant as against the plaintiff as of the date of April 28th, 1905, together with the costs of this action to be taxed, and the said costs having been duly taxed at the sum of nine hundred and eighty-four 63/100 dollars ($984.63).

Now, upon motion of Olney & Comstock, defendant's attorneys, it is

Adjudged, that the complaint herein be dismissed on the merits and that the defendant, the General Fire Extinguisher Company will recover of the plaintiff, John N. Bagley, the sum of nine hundred and eighty-four 63/100 dollars ($984.63) costs, and that the defendant have execution therefor.

Dated New York, May 27, 1905.

Judgment signed this 27th day of May, 1905.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States Circuit Court, Southern District of N. Y.—John N. Bagley, Plaintiff, *vs.* The General Fire Extinguisher Co., Defendant.—Judgment, etc.—Olney & Comstock, Attorneys for Defendant, No. 68 William Street, New York, N. Y.—We hereby admit service of the within. Dated New York, May 9th, 1905.—Parsons, Closson & McIlvaine, Pl'ff's Att'ys.—U. S. Circuit Court, Southern District, New York.—Filed May 27, 1905.—John A. Shields, Clerk.

120 Circuit Court of the United States, Southern District of New York.

JOHN N. BAGLEY, Plaintiff,
against
THE GENERAL FIRE EXTINGUISHER COMPANY, Defendant.

Take notice that the plaintiff hereby excepts—

First. To the Referee's Report, Decision and Findings as follows:

To the Findings of Fact:

I. To so much of the fifth finding of fact as finds that the system of fire extinguisher apparatus with which the defendant equipped the said property was an approved system; or that the defendant for so much of the said system as was installed in the skylights in the said buildings supplied the materials or performed the labor described or enumerated in the specifications annexed to the agreement or any agreement.

II. To so much of the sixth finding of fact as finds that the materials furnished by the plaintiff for so much of the system as was installed in the said skylights were first-class or that the said work done in the said skylights was done in a thorough or workmanlike manner or in conformity with the improved Risks Commission standard.

121 III. To so much of the seventh finding of fact as finds that the purpose of the inspection by the improved Risks Commission included the purpose of ascertaining the condition or fitness of any sprinkler devices installed therein for retaining the water in the pipes of the system when there should be no fire in the building.

IV. To so much of the eighth finding of fact as finds that the purpose on the part of the said "Estate of John J. Bagley" was to

obtain increased fire protection solely and not also protection against the danger of flooding the building by water when there should be no fire in the building.

V. To so much of the eleventh finding of fact as finds that the said plans designated that the said sprinkler heads to be located in the skylights were ordinary heads, or that there was thereby meant those intended to fuse at 155 degrees Fahrenheit.

VI. To so much of the twelfth finding of fact as finds that the inspection referred to included anything more than the manner in which sprinkler heads were placed in one of the skylights.

VII. To so much of the fourteenth finding of fact as finds that it was proper practice at that time or at any time to place in either of the skylights in question sprinkler heads intended to fuse at 155 degrees Fahrenheit.

VIII. To so much of the fourteenth finding of fact as finds that had other heads than those intended to fuse at 155 degrees Fahrenheit, been placed in the skylights the same would have been ordered out by the said inspector.

IX. To so much of the sixteenth finding of fact as finds
122 that there was any extraordinary degree of heat in the skylights at the time of the fusing, or that that was the reason why said sprinkler heads fused, or that the fusing was not because there were defects in the materials used and in the installation aforesaid, and because the sprinkler heads fused at a lesser degree of heat than that at which they were intended to fuse.

X. To so much of the seventeenth finding of fact as finds that the temperature in said skylights at the time in question, reached 155° Fahrenheit, or that the sprinkler heads which fused were up to the standard for such sprinkler heads, or that the sprinkler heads which fused did not fuse at less than 155° Fahrenheit.

XI. To so much of the eighteenth finding of fact as finds that the temperature in the said skylights at the time of said fusing was extraordinary, or that there were any other extraordinary physical conditions in or about said skylights or any lack of draughts of air therein, or that any extraordinary physical conditions or any lack of draughts of air or extraordinary temperature caused the fusing of the said sprinkler heads.

XII. To so much of the eighteenth finding of fact as finds that of the conditions which caused the fusing of the said sprinkler heads the erection of them in the skylights and the exposure of them to the heat normally prevailing there in the summer, was not caused by the defendant and was not the fault of the defendant.

XIII. To so much of the twenty-second finding of fact as finds that the said action was not defended by the defendant jointly with the said "Estate of John J. Bagley."

123 XIV. To the twenty-seventh finding of fact and to each and every part thereof.

XV. To the twenty-eighth finding of fact and to each and every part thereof.

To the Conclusions of Law:

XVI. To so much of the first conclusion of law as finds that no other duties or obligations than those expressed in the said agreement were owing in the premises by the defendant to the said Estate of John J. Bagley.

XVII. To so much of the first conclusion of law as finds that the defendant did not owe to the said Estate of John J. Bagley the duty and obligation to use reasonable care and skill.

(*a.*) Before installing sprinkler heads designed to fuse at 155 degrees Fahrenheit in said skylights to ascertain the temperature to which they would be likely to be there heated by the rays of the sun, and to ascertain whether or not such temperature would exceed that at which the sprinkler heads were designed to fuse.

(*b.*) To install a system, such and so, that it should be reasonably adapted to the purpose of discharging the water contained in it upon the building and its contents in case a fire should break out in the building, and only in that case.

(*c.*) So to select its materials for its sprinkler heads and so to locate the sprinkler heads that they would not fuse and discharge the water retained by them when exposed to no heat but that of the sun.

XVIII. To so much of the second, sixth and seventh con-
124 clusions of law as finds that the defendant did not assume the duties and obligations set forth in the foregoing exception numbered XVII.

(*a.*) To the said Peerless Manufacturing Company.

(*b.*) To the said Burnham-Stoepel Company.

(*c.*) To the said United States Casualty Company, insurers of Burnham-Stoepel Company.

(*d.*) To the said "Estate of John J. Bagley."

XIX. To the third conclusion of law and to each and every part thereof.

XX. To so much of the third, sixth and seventh conclusions of law as finds that the defendant performed or fulfilled of the obligations in said agreement any of the following:

(*a.*) To equip the said property with an improved system of fire extinguisher apparatus.

(*b.*) To install a system reasonably adapted to the purpose of discharging the water contained in it upon the building and its contents in case a fire should break out in the building, and only in that case.

(*c.*) To use in the sprinkler heads erected by it in the skylights material reasonably fit and of the class best fitted for the purpose of fusing if a fire should break out in the building, and if not to prevent the water in the pipes from being discharged upon the building.

(*d.*) To do its work in a thorough and workmanlike manner in selecting and locating its sprinkler heads so that not only would they fuse in case a fire should break out in the building, but
125 would not fuse when exposed to no heat but that of the rays of the sun.

(*e.*) Before erecting in the skylights in question sprinkler heads designed to fuse at 155° Fahrenheit, to take reasonable care to as-

certain whether or not in the position in which the defendant placed them, they would be raised to that temperature by the heat of the sun alone.

XXI. To the fourth conclusion of law and to each and every part thereof.

XXII. To so much of the fourth conclusion of law as finds that the opening of the said sprinkler heads and the flowing of water in consequence thereof, and the damages thereby caused, were not due to or caused by

(*a.*) The breach of some or all of the duties and obligations on the part of the defendant specified above in exception numbered XVII; and the negligence of the defendant in failing to perform such duties and obligations.

(*b.*) Because of the failure on the part of the defendant herein to perform the obligations in the aforesaid agreement, specified above in exception numbered XX; and the breach of warranty on the part of the defendant in failing so to perform them.

XXIII. To the fifth conclusion of law and to each and every part thereof.

XXIV. To so much of the fifth conclusion of law as finds that the said judgments did not adjudge.

(*a.*) That the defendant did not exercise reasonable care in erecting its sprinkler system to ascertain whether the sprinkler
126 heads erected by it in the skylights in question would, by the heat of the sun alone, be raised to the temperature at which they were designed to fuse.

(*b.*) That it was the duty both of the said "Estate of John J. Bagley" and of their contractor, the defendant, to exercise reasonable care in erecting its sprinkler system to ascertain whether the sprinkler heads erected by it in the skylights in question would by the heat of the sun alone be raised to the temperature at which they were designed to fuse.

(*c.*) That the metal of which the sprinkler heads erected by the defendant in the skylights in question were in part composed was designed by it to fuse at a temperature which it ought reasonably to have been anticipated would be reached in the skylights without other heat than that of the rays of the sun in summer.

(*d.*) That it was negligence on the part of the persons doing the work to place 155° sprinkler heads in the skylights in question.

(*e.*) That the fusible metal employed by the defendant in the sprinkler heads erected by it in the skylights in question was not first-class or suitable material for the purpose which it was there designed to serve.

(*f.*) That the erection in the skylights in question of a sprinkler system, the water in which was prevented from escaping only by materials which would fuse under the heat of the sun in summer, was not workmanlike work.

XXIV. To so much of the fifth and sixth conclusions of law as finds that it is not in this suit *res adjudicata* by the said
127 judgments, by virtue of the provisions of section 1 of Article IV, of the Constitution of the United States and that the

said judgments were not binding upon the defendant in this action as adjudications;

(*a.*) That the tenants of the "Estate of John J. Bagley" were not guilty of any negligence contributing to the loss for the damage by which they recovered in the Michigan suits.

(*b.*) That it was negligent workmanship to erect in the skylights in question the 155° sprinkler heads.

(*c.*) That it was negligent to use as material for the sprinkler heads erected in the skylights in question solder which was designed to fuse and would fuse at the temperature at which it did there fuse on the 4th day of July, 1897.

(*d.*) That the sprinkler system of the defendant was erected in a negligent and careless manner, and that such negligence and carelessness in the erection of the defendant's sprinkler system was the proximate cause of the damages to the tenants of the "Estate of John J. Bagley" for which they recovered in the Michigan suits.

(*e.*) That the damages occasioned to the "Estate of John J. Bagley" by the negligent manner in which the defendant's sprinkler system was erected, included the amount paid by the said Estate in satisfaction of the Michigan judgments.

XXV. To the eighth conclusion of law and to each and every part thereof.

SECOND: To the refusal of the Referee to find of the requests submitted to him by the plaintiff the following:

128 XXVI. The plaintiff's request for the finding of fact numbered "1."

XXVII. The plaintiff's request for the finding of fact numbered "2."

XXVIII. The plaintiff's request for the finding of fact numbered "3."

XXIX. The plaintiff's request for the finding of fact numbered "4."

XXX. The plaintiff's request for the finding of fact numbered "5."

XXXII. The plaintiff's request for the finding of fact numbered "6."

XXXI. The plaintiff's request for the finding of fact numbered "7."

XXXIII. The plaintiff's request for the finding of fact numbered "8."

XXXIV. The plaintiff's request for the finding of fact numbered "9."

XXXV. The plaintiff's request for the finding of fact numbered "10."

XXXVI. The plaintiff's request for the finding of fact numbered "11."

XXXVII. The plaintiff's request for the finding of fact numbered "12."

XXXVIII. The plaintiff's request for the finding of fact numbered "13."

129 XXXIX. The plaintiff's request for the finding of fact numbered "14."

XL. The plaintiff's request for the finding of fact numbered "15."

XLI. The plaintiff's request for the finding of fact numbered "16."

XLII. The plaintiff's request for the finding of fact numbered "17."

XLIII. The plaintiff's request for the finding of fact numbered "18."

XLIV. The plaintiff's request for the finding of fact numbered "19."

XLV. The plaintiff's request for the finding of fact numbered "20."

XLVI. The plaintiff's request for the finding of fact numbered "21."

XLVII. The plaintiff's request for the finding of fact numbered "22."

XLVIII. The plaintiff's request for the finding of fact numbered "23."

XLIX. The plaintiff's request for the finding of fact numbered "24."

L. The plaintiff's request for the finding of fact numbered "25."

LI. The plaintiff's request for the finding of fact numbered "26."

130 LII. The plaintiff's request for the finding of fact numbered "27."

LIII. The plaintiff's request for the finding of fact numbered "28."

LIV. The plaintiff's request for the finding of fact numbered "29."

LV. The plaintiff's request for the finding of fact numbered "30."

LVI. The plaintiff's request for the finding of fact numbered "31."

LVII. The plaintiff's request for the finding of fact numbered "32."

LVIII. The plaintiff's request for the finding of fact numbered "33."

LIX. The plaintiff's request for the finding of fact numbered "34."

LX. The plaintiff's request for the finding of fact numbered "35."

LXI. The plaintiff's request for the finding of fact numbered "36."

LXII. The plaintiff's request for the finding of fact numbered "37."

LXIII. The plaintiff's request for the finding of fact numbered "38."

LXIV. The plaintiff's request for the finding of fact numbered "39."

LXV. The plaintiff's request for the finding of fact numbered "40."

131 LXVI. The plaintiff's request for the finding of fact numbered "41."

LXVII. The plaintiff's request for the finding of fact numbered "42."

LXVIII. The plaintiff's request for the finding of fact numbered "43."

LXIX. The plaintiff's request for the finding of fact numbered "44."

LXX. The plaintiff's request for the finding of fact numbered "45."

LXXI. The plaintiff's request for the finding of fact numbered "46."

LXXII. The plaintiff's request for the finding of fact numbered "47."

LXXIII. The plaintiff's request for the finding of fact numbered "48."

LXXIV. The plaintiff's request for the finding of fact numbered "49."

LXXV. The plaintiff's request for the finding of fact numbered "50."

LXXVI. The plaintiff's request for the finding of fact numbered "51."

LXXVII. The plaintiff's request for the finding of fact numbered "52."

LXXVIII. The plaintiff's request for the finding of fact numbered "53."

132 LXXIX. The plaintiff's request for the finding of fact numbered "54."

LXXX. The plaintiff's request for the finding of fact numbered "55."

LXXXI. The plaintiff's request for the finding of fact numbered "56."

LXXXII. The plaintiff's request for the finding of fact numbered "57."

LXXXIII. The plaintiff's request for the finding of fact numbered "58."

LXXXIV. The plaintiff's request for the finding of fact numbered "59."

LXXXV. The plaintiff's request for the finding of fact numbered "60."

LXXXVI. The plaintiff's request for the finding of fact numbered "61."

LXXXVII. The plaintiff's request for the finding of fact numbered "62."

LXXXVIII. The plaintiff's request for the finding of fact numbered "63."

LXXXIX. The plaintiff's request for the finding of fact numbered "64."

XC. The plaintiff's request for the finding of fact numbered "65."

XCI. The plaintiff's request for the finding of fact numbered "66."

133 XCII. The plaintiff's request for the finding of fact numbered "67."

XCIII. The plaintiff's request for the finding of fact numbered "68."

XCIV. The plaintiff's request for the conclusion of law numbered "1."

XCV. The plaintiff's request for the conclusion of law numbered "2."

XCVI. The plaintiff's request for the conclusion of law numbered "3."

XCVII. The plaintiff's request for the conclusion of law numbered "4."

XCVIII. The plaintiff's request for the conclusion of law numbered "5."

XCIX. The plaintiff's request for the conclusion of law numbered "6."

C. The plaintiff's request for the conclusion of law numbered "7."

CI. The plaintiff's request for the conclusion of law numbered "8."

CII. The plaintiff's request for the conclusion of law numbered "9."

CIII. The plaintiff's request for the conclusion of law numbered "10."

134 CIV. The plaintiff's request for the conclusion of law numbered "11."

CV. The plaintiff's request for the conclusion of law numbered "12."

CVI. The plaintiff's request for the conclusion of law numbered "13."

CVII. The plaintiff's request for the conclusion of law numbered "14."

CVIII. The plaintiff's request for the conclusion of law numbered "15."

CIX. The plaintiff's request for the conclusion of law numbered "16."

CX. The plaintiff's request for the conclusion of law numbered "17."

CXI. The plaintiff's request for the conclusion of law numbered "18."

CXII. The plaintiff's request for the conclusion of law numbered "19."

CXIII. The plaintiff's request for the conclusion of law numbered "20."

CXIV. The plaintiff's request for the conclusion of law numbered "21."

CXV. The plaintiff's request for the conclusion of law numbered "22."

135 CXVI. The plaintiff's request for the conclusion of law numbered "23."

Dated June 21st, 1905.

PARSONS, CLOSSON & McILVAINE,
Attorneys for Plaintiff.

52 William Street, Borough of Manhattan, New York City, N. Y.

To Messrs. Olney & Comstock, Attorneys for Defendant.

(Endorsed:) U. S. Circuit Court, Southern District of New York.—John N. Bagley, against The General Fire Extinguisher Company.—Plaintiff's Exceptions to Referee's Findings and Refusals to Find.—Parsons, Closson & McIlvaine, Attorneys for Plaintiff, 52 William Street, New York City.—Due service of a copy of within exceptions is hereby admitted this 22d day of June, 1905.—Olney & Comstock, Defts. Attys.—U. S. Circuit Court, Southern District New York.—Filed Jun- 22, 1902.—John A. Shields, Clerk.

136 Circuit Court of the United States for the Southern District of New York.

JOHN N. BAGLEY
against
THE GENERAL FIRE EXTINGUISHER COMPANY.

The plaintiff hereby submits in writing a statement of the facts which he deemed established by the evidence and of the rulings upon questions of law which he desires the Referee to make. (By "plaintiff's assignors" are throughout intended the persons owning the property in question and contracting with the defendant under the name of "Estate of John J. Bagley," referred to in the first finding of fact proposed by defendant. By "Michigan judgments" and "Michigan actions" are intended the actions brought by the Peerless Manufacturing Company and the United States Casualty Company, respectively, referred to in the twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth and twenty-sixth findings of fact proposed by the defendant).

If the Referee shall decline to find any one of the findings of fact or conclusions of law requested, he is then requested in each such case to find what was the fact or what is the rule of law in regard to the subject matter of each such request.

Findings of Fact.

1. At the time when the contract with the defendant was made, and thereafter for more than a year, neither of the plaintiff's
137 assignors nor of the managing trustees had any knowledge of the proper construction for the sake of safety of a sprinkler system or the proper mode of arranging it (pp. 12 and 18).

Refused. C. F. B., Referee.

2. Neither of the plaintiff's assignors or of the trustees representing them, had anything to do with the preparation of the plans under which the defendant's system was installed, or made any suggestions, or gave any directions to the defendant as to how it should install it, or what sort of apparatus it should use, or where it should locate it; excepting that the plaintiff objected, upon the ground of its unsightly appearance, to the proposed location of one of the upright pipes on the ground floor of the Burnham & Stoepel Building; and in order to allow some machinery to be erected on the fourth floor of the

Peerless building, asked the defendants to allow two elbows to be placed in the supply pipe on the floor to make room for the machinery (pp. 12, 18, 19 and 44).

Refused. C. B. F., Referee.

3. The plaintiff's assignors, in regard to the propriety and safety of the installation of the sprinkler system, relied upon the reputation of the defendant, with whom they made the contract (p. 13).

Refused. C. F. B., Referee.

4. The defendant did not complete the erection of its sprinkler system in the building of the plaintiff's assignors until the latter part of September, 1896 (p. 65).

Refused. C. F. B., Referee.

138 5. At all times during the year 1897 and since there has been maintained in the City of Detroit an office of the United States Weather Bureau situated on the roof of a ten-story building about 600 feet northwesterly from the building of the plaintiff's assignor's (pp. 132, 133, 189). Among the instruments maintained there during this period was one which automatically recorded the temperature of the air in a lattice structure about 15 feet above the roof of the building, sheltered from the rays of the sun, through which the air circulated freely (pp. 132, 135).

Refused. C. F. B., Referee.

6. On the 4th day of July, 1897, the following temperatures were recorded by the instrument of the United States Weather Bureau, sheltered from the sun, but exposed to the free circulation of the air in the structure referred to in the previous finding:

At 10 A. M. Eastern Standard Time, 87° Fahrenheit.
At 11 A. M. Eastern Standard Time, 90° Fahrenheit.
At noon Eastern Standard Time, 90° Fahrenheit.
At 1 P. M. Eastern Standard Time, 91° Fahrenheit.
At 2 P. M. Eastern Standard Time, 93° Fahrenheit.
At 3 P. M. Eastern Standard Time, 94° Fahrenheit.
At 4 P. M. Eastern Standard Time, 94° Fahrenheit.
At 5 P. M. Eastern Standard Time, 94° Fahrenheit.
At 6 P. M. Eastern Standard Time, 94° Fahrenheit (p. 134).

Refused. C. F. B., Referee.

139 7. On the 10th day of July, 1897, the following temperatures were recorded by the instrument referred to in the last finding:

At 10 A. M. Eastern Standard Time, 88° Fahrenheit.
At 11 A. M. Eastern Standard Time, 91° Fahrenheit.
At noon Eastern Standard Time, 91° Fahrenheit.
At 1 P. M. Eastern Standard Time, 92° Fahrenheit.
At 2 P. M. Eastern Standard Time, 92° Fahrenheit.
At 3 P. M. Eastern Standard Time, 93° Fahrenheit.
At 4 P. M. Eastern Standard Time, 93° Fahrenheit.
At 5 P. M. Eastern Standard Time, 93° Fahrenheit.
At 6 P. M. Eastern Standard Time, 92° Fahrenheit (p. 134).

Refused. C. F. B., Referee.

8. On the 1st day of July, 1901, the following temperatures were recorded by the instrument referred to in the last finding:

At 10 A. M. Eastern Standard Time, 88° Fahrenheit.
At 11 A. M. Eastern Standard Time, 90° Fahrenheit.
At noon Eastern Standard Time, 92° Fahrenheit.
At 1 P. M. Eastern Standard Time, 92° Fahrenheit.
2 P. M. Eastern Standard Time, 93° Fahrenheit.
At 3 P. M. Eastern Standard Time, 93° Fahrenheit.
140 At 4 P. M. Eastern Standard Time, 93° Fahrenheit.
At 5 P. M. Eastern Standard Time, 93° Fahrenheit (p. 134).
At 6 P. M. Eastern Standard Time, 94° Fahrenheit.
Refused. C. F. B., Referee.

9. On the 2d day of July, 1901, the following temperatures were recorded by the instrument referred to in the last finding:
At 10 A. M. Eastern Standard Time, 78° Fahrenheit.
At 11 A. M. Eastern Standard Time, 80° Fahrenheit.
At noon Eastern Standard Time, 83° Fahrenheit.
At 1 P. M. Eastern Standard Time, 86° Fahrenheit.
At 2 P. M. Eastern Standard Time, 87° Fahrenheit.
At 3 P. M. Eastern Standard Time, 88° Fahrenheit.
At 4 P. M. Eastern Standard Time, 89° Fahrenheit.
Refused. C. F. B., Referee.

10. The temperature indicated by a record of 94° by the instruments of the United States Weather Bureau at their office in the City of Detroit, is not an unusual or extraordinary temperature in the City of Detroit during the summer months (p. 140).
Refused. C. F. B., Referee.

11. In the City of Detroit it is usual to have temperature
141 ranging about from 90 to 96° Fahrenheit in the shade every summer under ordinary circumstances (p. 140).
Refused. C. F. B., Referee.

12. The building of the plaintiff's assignors, in which the defendant's sprinkler system was installed, was a five-story building, about 68 feet high (Jardine's Report), consisting of two parts, one known as the Burnham-Stoepel Building, and the other as the Peerless Manufacturing Company's building.
Refused. C. F. B., Referee.

13. In the roof of the Burnham-Stoepel Building, and likewise in the roof of the Peerless Manufacturing Company Building, was a skylight, each consisting of wooden frame work supporting panes of heavy cathedral glass, these constituting an inverted V-shaped roof running east and west, and a horizontal floor substantially on the same level as the ceiling of the fifth floor, likewise consisting of panes of glass.
Refused. C. F. B., Referee.

14. The interior length of the Peerless skylight was about 19 feet 10 inches; that of the Burnham-Stoepel skylight 18 feet. The interior height of the Peerless skylight, from the floor to the apex of the roof, was about 4 feet, 3 inches; that of the Burnham-Stoepel skylight about 4 feet, 6 inches. The interior width of both skylights was about 11 feet, 8 inches. The length of both ran east and west (pp. 154, 156).
Refused. C. F. B., Referee.

15. As a part of its sprinkler system the defendant car-
142 ried a vertical water pipe into each of the skylights in question through the glass floor, and connected this with a horizontal pipe running nearly under the ridge pole of the skylight. On this horizontal piece of pipe there was placed two 155° sprinkler heads about 10 feet apart, projecting upwards. The opening of each was about 5 inches below the bottom of the ridge pole of the skylight.

Refused. C. F. B., Referee.

16. Each skylight was fitted with a ventilating pipe about 10 inches in diameter attached to the end of the skylight and turning upwards terminating in a water hood (pp. 154, 158).

Refused. C. F. B., Referee.

17. The condition of each of these skylights as it existed during the period while the defendant was erecting its sprinkler system, remained the same without change until after July 1st, 1901.

Refused. C. F. B., Referee.

18. On the 10th day of July, 1897, a test thermometer hung upon the yoke of the sprinkler head in the Peerless skylight, which on the 4th of July previous had fused, with a bright bulb exposed to the sun, showed the following temperatures:

At 11.55 A. M., 120° Fahrenheit.
At noon, 127° Fahrenheit.
At 12.10 P. M., 128° Fahrenheit.
At 12.30 P. M., 142° Fahrenheit.
At 1 P. M., 144° Fahrenheit.
At 1.30 P. M., 146° Fahrenheit.
At 2 P. M., 146° Fahrenheit.
At 2.30 P. M., 145° Fahrenheit.
At 3 P. M., 142° Fahrenheit.
At 3.30 P. M., 139° Fahrenheit.
At 4 P. M., 133½° Fahrenheit.
At 4.30 P. M., 129½° Fahrenheit (p. 162).

Refused. C. F. B., Referee.

143 19. On July 10th, 1897, between noon and 2.30 P. M., a sprinkler head in the Peerless skylight, which had not fused on the 4th day of July, 1897, fused under the heat of the sun (p. 163).

Refused. C. F. B., Referee.

20. On July 1st, 1901, the same test thermometer similarly placed in the Burnham-Stoepel skylight, exposed to the sun, showed the following temperatures:

At 10.15 A. M., Central Standard Time, 142° Fahrenheit.
At 1.30 P. M., Central Standard Time, 145° Fahrenheit.

Refused. C. F. B., Referee.

21. On July 2d, 1901, at 11 A. M., the same thermometer in the same place showed a temperature of 140° Fahrenheit (p. 166).

Refused. C. F. B., Referee.

22. On July 6th, 1901, the same test thermometer placed in the skylight indicated a temperature at 10.15 A. M. of 123°; and on

being removed to the floor directly below the skylight the mercury in the thermometer fell 20° in one minute (p. 167).

Refused. C. F. B., Referee.

23. In the basement of the Burnham-Stoepel building was a boiler room containing two tubular boilers furnishing steam. The temperatures of the skylights in question on a bright sunny day in summer is higher than that of the boiler room (pp. 182, 183).

Refused. C. F. B., Referee.

144 24. The sprinkler system extended into the boiler room in the Burnham-Stoepel building. The sprinkler heads installed there by the defendant were marked 286° and were designed to fuse at a temperature not below 280°. The installation of these heads in the boiler room in question was approved by the Improved Risk Commission and by Robert Jardine, the inspector, who, on their behalf, inspected the buildings after the completion of the system.

Refused. C. F. B., Referee.

25. The bottom of each of the skylights in question was completely enclosed by a glass floor, except for a space of about 2 feet in diameter made by taking out two or three of the panes of glass (p. 186).

Refused. C. F. B., Referee.

26. The two skylights in question in the building of the plaintiff's assignors differed from any of which had been previously examined by the inspector of the Improved Risk Commission, in having the glass floor in question (p. 207).

Refused. C. F. B., Referee.

27. The approval by the Improved Risk Commission of the practice of installing 155° heads under skylights was based upon the assumption that under regular conditions, in the absence of a glass floor to the skylight, the temperature should be about the same throughout the entire room (p. 209).

Refused. C. F. B., Referee.

28. It was the object of the inspection on behalf of the Improved Risk Commission of the sprinkler system installed
145 by the defendant, to ascertain that the system was in such condition that it would go off in case of a fire and as early after the starting of a fire as possible.

Refused. C. F. B., Referee.

29. The more easily the sprinkler heads would fuse the better they served the interest of the Improved Risk Commission. It would occasion no loss to the Improved Risk Commission or the fire insurance companies concerned in it if the sprinklers of the defendant's system should be so easily fusible as to fuse even when there was no fire in the building (pp. 209, 210).

Refused. C. F. B., Referee.

30. After obtaining from the plaintiff's assignors the acceptance of its bid for the erection of its sprinkler system, the defendant made certain plans, showing the details of the construction of the system to be installed. These plans did not show what kind of sprinkler heads were to be placed in the skylights (p. 212).

Refused. C. F. B., Referee.

31. The inspector employed by the Improved Risk Commission, upon whose report the commission approved the system installed by the defendant, did not in inspecting the building examine the sprinkler heads installed in the skylight of the Peerless building, nor more than one of those installed in the skylight in the Burnham-Stoepel building (pp. 214, 217).

Refused. C. F. B., Referee.

32. The inspector employed by the Improved Risk Commission, upon whose report the commission approved the system installed by the defendant, did not in inspecting the building examine the
146 sprinkler heads installed by the defendant in the boiler room over the boilers (p. 217).

Refused. C. F. B., Referee.

33. The inspector employed by the Improved Risk Commission, upon whose report the commission approved the system installed by the defendant, had never before seen any part of a sprinkler system installed in a skylight, the bottom of which was enclosed in a glass floor (p. 218).

Refused. C. F. B., Referee.

34. Good workmanship in installing the defendant's sprinkler system required that there should be a margin of about 30 degrees between the temperature at which each sprinkler head erected by it should be designed to fuse and the highest temperature likely to be reached in the place in which it should be erected (p. 219).

Refused. C. F. B., Referee.

35. The inspector of the Improved Risk Commission, upon whose report the commission approved the system installed by the defendant, would not again approve a sprinkler system consisting in part of sprinkler heads, in either of the skylights in the building in question designed to fuse at 155 degrees Fahrenheit.

Refused. C. F. B., Referee.

36. Sprinkler heads are made to fuse at varying degrees of temperature from 155 degrees up to about 300 degrees (p. 224).

Refused. C. F. B., Referee.

37. The temperature of the sprinkler heads installed by the
147 defendant in the skylights in question when exposed to the rays of the sun, would be from 15 degrees to thirty degrees higher than the temperature which might be indicated by a thermometer with a bright bulb similarly exposed in the same place, owing to the fact that much of the heat which would be reflected by the bright bulb of the thermometer would be absorbed by the sprinkler head with its comparatively dull surface (pp. 258, 264, 268, 285, 286).

Refused. C. F. B., Referee.

38. The temperature of the sprinkler heads installed by the defendant in the skylights of the building in question on both July 4th and July 10th, 1897, went above 155 degrees Fahrenheit.

Refused. C. F. B., Referee.

39. The proposal for the erection of the defendant's sprinkler system in the building of plaintiff's assignors, which was accepted by them, was made by one Byron W. Dawley, the general manager of

the defendant's business in that territory, having an office at Chicago, Illinois, who had been engaged in the business successively as foreman, superintendent and manager for some twenty-five years, having charge of the installations of defendant's system, the making of plans for them and the mechanical construction of the work (Contract and Minutes, pp. 290 and 291).

Refused. C. F. B., Referee.

40. During the installation of the defendant's system in the building of the plaintiff's assignors the latter did not, nor did any of them, exercise any supervision over the work or have anything to do with the preparation of the plans for it (p. 295).

Refused. C. F. B., Referee.

148 41. The plans and specifications for the installation of the defendant's system in the building in question were prepared in the office of the general manager of the defendant at Chicago, Illinois (p. 295).

Refused. C. F. B., Referee.

42. Under proper and ordinary conditions, the sprinkler heads of the defendant's system are supposed and designed not to fuse or open except in case of fire (p. 304).

Refused. C. F. B., Referee.

43. Before making his proposition for the erection of the defendant's sprinkler system in the building in question the general manager of the Chicago office of the defendant examined the building, including the skylights.

Refused. C. F. B., Referee.

44. The first time consideration was given by the general manager of the defendant to the question of the proper degree of fusibility for sprinkler heads to be erected in the skylights in the building in question was immediately after the fusing of two of them on July 4, 1897.

Refused. C. F. B., Referee.

45. The general manager of the Chicago office of the defendant would not locate or permit the location of a sprinkler head designed to fuse at 155 degrees in a place the temperature of which was likely to reach over 135 degrees F. (p. 306).

Refused. C. F. B., Referee.

46. It was not thorough or workmanlike work to erect in the skylights in question 155-degree sprinkler heads.

Refused. C. F. B., Referee.

149 47. It was not thorough or workmanlike work to erect in the skylights in question 155-degree sprinkler heads unless reasonable care was first taken to ascertain the temperature to which they would be likely to be heated by the rays of the sun.

Refused. C. F. B., Referee.

48. The defendant did not at any time before July 4th, 1897, make any reasonable effort, if any, or exercise reasonable care, if any, to determine the temperature to which the sprinkler heads installed or to be installed by it in the skylights in question would be raised by the heat of the sun.

Refused. C. F. B., Referee.

49. If the defendant had made any reasonable effort or used any reasonable care to ascertain the temperature to which the sprinkler heads installed or to be installed by it in the skylights in question would be raised by the heat of the sun, it would have ascertained that the sprinkler heads would in the summer be exposed to a heat of over 140 degrees of the air immediately surrounding them and become heated themselves to a temperature 15 degrees to 20 degrees higher.

Refused. C. F. B., Referee.

50. The sprinkler system installed by the defendant in the building of the plaintiff's assignors was a dangerous appliance, in that the sprinkler heads in the skylights were liable to be raised by the heat of the sun alone to a temperature at which they would fuse, and in fusing automatically precipitate the water contained in the piping and the tank connected with it upon the building and its contents until the flow of the water should be stopped by some human agency.

Refused. C. F. B., Referee.

150 51. In and by its contract with the plaintiff's assignors the defendant agreed to equip their property with "an approved system of fire extinguisher apparatus," and thereby agreed that the system which it would install should be reasonably adapted to the purpose of discharging the water contained in it upon the building and its contents in case a fire should break out in the building and only in that case.

Refused. C. F. B., Referee.

52. The system installed by the defendant was not reasonably adapted to the purpose of discharging the water upon the building and its contents in case a fire should break out in the building and only in that case.

Refused. C. F. B., Referee.

53. In and by its contract with the plaintiff's assignors the defendant agreed that the material used by it in the erection of its sprinkler system should be of the class best fitted for the purpose which it was designed to serve.

Refused. C. F. B., Referee.

54. One purpose which the material of which the sprinkler heads erected by the defendant in the skylights in question was designed to serve was to prevent, except in case of a fire in the building, the water in the pipes from being discharged upon the building or its contents.

Refused. C. F. B., Referee.

55. The fusible metal of which the sprinkler heads erected in the skylights in question were in part composed did not belong to the class of material best adapted to the purpose of preventing,

151 except in case of a fire in the building, the water in the pipes from being discharged upon the building or its contents.

Refused. C. F. B., Referee.

56. It was not workmanlike work to erect in the skylights in question sprinkler heads which would fuse when there was no fire in the building, but only the heat caused by the rays of the sun.

Refused. C. F. B., Referee.

57. Metal which would fuse in the skylights in question at the temperature to which it would be heated by the rays of the sun alone was not first-class material.

Refused. C. F. B., Referee.

58. Workmanlike work on the part of the defendant in erecting its sprinkler system required it to leave a margin of safety of some 30 degrees between the temperature at which each sprinkler head would fuse and the temperature to which it might be raised by the heat of the sun alone.

Refused. C. F. B., Referee.

59. During the first week of the first July after the completion of the erection of the sprinkler system by the defendant in the building in question, two of the four sprinkler heads erected by the defendant in the skylights in question; and during the second week of the same July another of the four were raised by the heat of the sun alone to a temperature at which they fused.

Refused. C. F. B., Referee.

60. It was not workmanlike work on the part of the defend-
152 ant to erect in the skylights in question 155-degree heads unless it should first take reasonable care to ascertain the temperature to which they would be there exposed by the heat of the sun alone.

Refused. C. F. B., Referee.

61. If the defendant had taken reasonable care to ascertain the temperature to which the sprinkler heads erected by it in the skylights in question might be raised by the heat of the sun alone, it would have ascertained that that temperature might probably be the same as that at which the heads were designed to fuse.

Refused. C. F. B., Referee.

62. The plaintiff did not stipulate, nor did the defendant agree, that any sprinkler heads whatever should be erected in either of the skylights in question.

Refused. C. F. B., Referee.

63. In and by the Michigan judgments it was adjudged that the defendant did not exercise reasonable care in erecting its sprinkler system to ascertain whether the sprinkler heads erected by it in the skylights in question would by the heat of the sun alone be raised to the temperature at which they were designed to fuse.

Refused. C. F. B., Referee.

64. In and by the Michigan judgments it was adjudged that it was the duty of the plaintiff's assignors and of their contractor, the defendant, to exercise reasonable care in erecting its sprinkler system to ascertain whether the sprinkler heads erected by it in the skylights in question would, by the heat of the sun alone, be raised to the temperature at which they were designed to fuse.

Refused. C. F. B., Referee.

153 65. In and by the Michigan judgments it was adjudged that the metal of which the sprinkler heads erected by the defendant in the skylights in question were in part composed, was designed by it to fuse at a temperature which it ought reasonably to

have been anticipated would be reached in the skylights without other heat than that of the rays of the sun in summer.

Refused. C. F. B., Referee.

66. In and by the Michigan judgments it was adjudged that it was negligence on the part of the persons doing the work to place these 150-degree sprinkler heads in the skylights in question.

Refused. C. F. B., Referee.

67. In and by the Michigan judgments is was adjudged that the fusible metal employed by the defendant in the sprinkler heads erected by it in the skylights in question was not first-class or suitable material for the purpose which it was there designed to serve.

Refused. C. F. B., Referee.

68. In and by the Michigan judgments it was adjudged that the erection in the skylights in question of a sprinkler system, the water of which was prevented from escaping only by materials which would fuse under the heat of the sun in summer, was not workmanlike work.

Refused. C. F. B., Referee.

Conclusions of Law.

1. If the Referee shall have declined to find as findings of fact of the foregoing requests those numbered respectively, to wit, 3,
154 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67 and 68, he is then requested separately as to each of such requests, to find it as a conclusion of law.

Refused. C. F. B., Referee.

2. By erecting a sprinkler system which was approved by the Improved Risk Commission, the defendant did not perform its contract unless its system was also so erected that when subjected to no heat but that of the sun it would safely retain the water contained in it so far as that result could be insured by thorough and workmanlike work in the erection of the system and the use in it of materials each of the first-class for the purpose which it was intended to serve.

Refused. C. F. B., Referee.

3. Impossibility, if it were proved, of erecting a sprinkler system which would retain the water contained in it when subjected to no heat but that of the sun and would at the same time obtain the approval of the Improved Risk Commission, would not excuse the defendant for breach of a contract to erect such a system.

Refused. C. F. B., Referee.

4. It was not impossible for the defendant to erect a system which would retain the water contained in it when subjected to no heat but that of the sun and would at the same time obtain the approval of the Improved Risk Commission.

Refused. C. F. B., Referee.

5. The inspection of the defendant's sprinkler system by the Improved Risk Commission was conclusive only as to its effect-
155 iveness as a means of extinguishing fire; and did not bear upon the question whether the materials of which it was composed were first-class or the work of erecting it done in a thorough or workmanlike manner or whether the sprinkler system was reason-

ably safe to retain the water it contained when subjected to the heat of the sun alone.

Refused. C. F. B., Referee.

6. The defendant's agreement that the material used by it in the sprinkler system should be first-class and the work done by it in erecting it should be thorough and workmanlike, was, so far as it related to the defects which caused the flooding of the building on July 4th, 1897, a warranty which survived acceptance.

Refused. C. F. B., Referee.

7. The defects in the defendant's sprinkler system which caused the flooding of the building on July 4th, 1897, were, so far as concerned the plaintiff's assignors, latent defects against which the defendant warranted its structure, and for the loss caused by which the remedy survived acceptance.

Refused. C. F. B., Referee.

8. It was the duty of the defendant to the plaintiff's assignors in erecting its sprinkler system to use reasonable care and skill so to select its materials for its sprinkler heads and so to locate the sprinkler heads that they would not fuse and discharge the water retained in them, when exposed to no heat but that of the sun.

Refused. C. F. B., Referee.

9. It was the duty both of the plaintiff's assignors and of
156 the defendant to the tenants of the building in erecting the sprinkler system to use reasonable care and skill so to select the materials for the sprinkler heads and so to locate the sprinkler heads that they would not fuse and discharge the water retained by them when exposed to no heat but that of the sun.

Refused. C. F. B., Referee.

10. The defendant did not use reasonable care or skill so to select its materials for its sprinkler heads that they would not fuse and discharge the water retained by them when exposed to no heat but that of the sun.

Refused. C. F. B., Referee.

11. The defendant did not use reasonable care or skill so to select the sprinkler heads forming a part of its system that these heads would not fuse and discharge the water retained by them when exposed to no heat by that of the sun.

Refused. C. F. B., Referee.

12. As between the plaintiff's assignors and the defendant, the duty referred to in the last three requests primarily devolved upon the defendant; and if by a breach of it the plaintiff's assignors were held liable to the tenants for the consequent damages in a suit which the defendant was duly notified of and allowed the opportunity to defend, the defendant became liable over to the plaintiff's assignors to make good the loss thereby occasioned to them, although the defendant may not have been directly liable to the tenants themselves.

Refused. C. F. B., Referee.

13. By virtue of the provisions of Section 1 of Article IV
157 of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that the tenants of

the plaintiff's assignors were not guilty of any negligence contributing to the loss, for the damage by which they recovered in the Michigan suits.

Refused. C. F. B., Referee.

14. By virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that it was negligent workmanship to erect in the skylights in question the 155° sprinkler heads.

Refused. C. F. B., Referee.

15. By virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that it was negligent to use as a material for the sprinkler heads erected in the skylights in question solder which was designed to fuse and would fuse at the temperature at which it did there fuse on the 4th day of July, 1897.

Refused. C. F. B., Referee.

16. By virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that the sprinkler system of the defendant was erected in a negligent and careless manner, and that such negligence and carelessness in the erection of the defendant's sprinkler system was the approximate cause of the damages to the tenants of the plaintiff's assignors for which the tenants recovered in the Michigan suit.

Refused. C. F. B., Referee.

158 17. By virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that the damages occasioned to the plaintiff's assignors by the negligent manner in which the defendant's sprinkler system was erected include the amount paid by the plaintiff's assignors in satisfaction of the Michigan judgments.

Refused. C. F. B., Referee.

18. The negligence and carelessness with which it was by the Michigan judgments adjudicated that the defendant's system was erected consisted of certain methods which the defendant voluntarily and of its own choice adopted to perform the obligations of its contract with the plaintiff's assignors, and not in anything which it was obliged by the terms of its contract to do in order to perform such obligations.

Refused. C. F. B., Referee.

19. Nothing in the defendant's contract with the plaintiff's assignors called for or excused the negligence or carelessness with which it was by the Michigan judgments adjudged that the defendant's sprinkler system was erected.

Refused. C. F. B., Referee.

20. The plaintiff is entitled to judgment against the defendant for the amounts paid by the plaintiff's assignors in satisfaction of the Michigan judgments.

Refused. C. F. B., Referee.

21. The plaintiff is likewise entitled to judgment against the defendant for interest upon the amounts paid by the plaintiff's
159 assignors in satisfaction of the Michigan judgments from the several dates on which the said sums were paid.

Refused. C. F. B., Referee.

22. The plaintiff is likewise entitled to judgment against the defendant for the sum of Two thousand two hundred and seventy-seven and 94/100 dollars ($2,277.94) paid by it for counsel fees and other necessary expenses, all of which were reasonable and proper in amount in the defense of the Michigan suits.

Refused. C. F. B., Referee.

23. The plaintiff is further likewise entitled to judgment against the defendant for interest upon the said sum of Two thousand two hundred and seventy-seven and 94/100 dollars ($2,277.94) from the 14th day of February, 1902, upon which date the said payment was made.

Refused. C. F. B., Referee.

Respectfully submitted.

PARSONS, CLOSSON & McILVAINE,
Attorneys for Plaintiff.

(Endorsed:) U. S. Circuit Court, Southern District of New York.—John N. Bagley, against the General Fire Extinguisher Company.—Requests for Findings.—Sprague, Closson & McIlvaine, Attorneys for Plaintiff, 52 William Street, New York City.—I refuse to find the within requests. Many of them are statements of testimony. The conclusions of fact I have drawn from the testimony appear in the decision. April 8, 1905. C. F. Brown, Referee.—U. S. Circuit Court, Southern District New York, Filed Nov. 15, 1905, John A. Shields, Clerk.

160 In the Circuit Court of the United States for the Southern District of New York.

JOHN N. BAGLEY
against
THE GENERAL FIRE EXTINGUISHER COMPANY.

Referee's Opinion.

In my opinion the plaintiff cannot recover in this action for the following reasons:

The defendant owed no duty to the tenants in the buildings in which the sprinklers were installed other than the manner of doing the work should cause them no injury.

This fact distinguishes the case from the class of cases cited in the brief of the plaintiff's counsel.

In cases like Washington Gas Co. *v.* District of Columbia, 161 U. S. 316; Mayor *v.* Brady, 151 N. Y., 611; Village of Port Jarvis *v.* National Bank of Port Jervis, 96 N. Y., 559, the parties ultimately made liable owed a duty to the party injured not to create a dangerous obstruction in the public street.

No duty of a similar character rested upon the defendant in this action.

The sole measure of its obligation is in its contract and having per-

formed that in accordance with its stipulations and provisions, it is not responsible for any loss caused by conditions existing in the buildings which it did not create.

In Prescott *v.* LeConte, 83 App. Div., 482, the injury sus-
161 tained by the occupants of the building was caused during the performance of the work and was the result of the omission to protect the opening to the roof.

It is said in the opinion in that case that:

"It was their (defendant's) duty to see that the opening in the roof was not left unprotected and for a failure to perform that duty they would have been liable to Blumenthal & Co. (the occupants) notwithstanding that the latter were not their direct tenants."

In this case there is no question but that the work contracted to be done was performed by the defendant and the injury sustained by the tenants was not due to any defects in the materials used or in the apparatus installed.

The defendant's duty in the premises and the extent of the obligation assumed by it must therefore be determined by reference to the contract it made with the Bagley estate.

The contract was in the form of a proposal by the defendant and an acceptance by the Bagley estate. The essential parts of the proposal are as follows:

To equip the property "with an approved system of fire extinguisher apparatus." * * * "All the materials to be first class and all work herein specified to be done in a thorough and workmanlike manner and in conformity with the Improved Risks Commission's standard of automatic sprinkler installation."

"It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party."

The purpose of the installation of the fire extinguishing
162 apparatus in the buildings was to obtain increased fire protection, and as a result thereof a decrease in insurance premiums to be paid by the owner of the buildings and the tenants.

The Improved Risks Commission was an association of Fire Insurance Companies, and the plaintiff testified as to his understanding of the provision quoted that he "knew that before the system was accepted by the insurance companies so that [illegible] would give the reduced insurance rate, it had to be approved b[illegible] man appearing for them."

Mr. Hopkins, who was one of the trustees of the estate, testified that he knew that there was such a commission, that it was an association of underwriters, and that Mr. Jardine was its representative in Detroit; that a sprinkler plant had been installed before the execution of the contract with the defendant in another building located opposite the one indicated in the contract which system had also received the approval of the Improved Risks Commission.

After the execution of the contract between the Bagley estate and the defendant a plan of the equipment showing the location of the sprinklers throughout the building was made by the defendant and

submitted to Mr. Robert Jardine, the inspector of the Improved Risks Commission, and such plan received his approval.

This plan showed that the sprinkler heads were to be located in the skylights, but did not designate whether they were to be those intended to fuse at 155 degrees Fahrenheit or 286 degrees Fahrenheit (those being the two kinds of sprinklers heads manufactured by the defendant.

Mr. Jardine, however, testified that in approving the plans submitted to him he had in mind that the sprinkler heads were to be of the ordinary kind, meaning thereby those intended to fuse at 155 degrees of heat.

163 The work was completed about the first of November 1896. It was examined twice by Mr. Jardine and approved by him and a report or certificate of such approval was made by him to the Improved Risks Commission and upon or after such approval the price named in the contract for the work was paid by the Bagley estate to the defendant.

Thereafter the Bagley estate and their tenants respectively obtained a decrease of insurance rates upon the building and the stocks of goods.

Mr. Jardine testified as to the manner in which he made his inspection of the system. He saw and examined sprinkler heads in the skylight and the manner in which they were placed and noted that they were those intended to fuse at 155 degrees of heat. He testified that in his judgment it was proper practice to place in the skylight sprinkler heads intended to fuse or melt at that degree of heat, and that had the other sprinkler heads intended to fuse at 286 degrees of heat been installed in the skylight, he would have ordered them out.

Mr. Jardine's report to the Improved Risks Commission was put in evidence in which the sprinkler equipment is stated in detail and pronounced "excellent."

Mr. Jardine further testified on cross-examination that he was in the employ of the insurance companies for the benefit of those companies, and that the easier the sprinkler heads would go off the better it would be for the companies that in order to be a proper workable system the sprinkler heads should remain closed under all ordinary conditions and only open in case of a fire, but that so far as his employers were concerned it would be no loss to them if the sprinkler heads should go off even if there was no fire, and that his duties as inspector for the insurance companies was to see that the system was in such condition that it would go off in case of a fire and as

164 early after the starting of the fire as possible and that in making the inspection he had in mind the interests of the fire insurance companies.

I have quoted this testimony as it shows clearly that in entering into the contract the parties had in mind the protection against fire only.

Undoubtedly no one thought of the possibility that in any part of the buildings the natural heat might arise under any condition as high as 155 degrees, or that the sprinkler heads which were installed

would melt or fuse under conditions arising from natural causes when there was no fire.

Such a condition was not to be anticipated in any building in Detroit in ordinary use, and the conditions which created it on the day of the accident were not of the defendant's creation but of the plaintiff and his assignors.

The specific act of negligence alleged in the suits brought by the defendant against the plaintiff and his assignors in Michigan, and upon proof of which judgments were rendered, was the failure on the part of the plaintiff and his assignors to ascertain the conditions that might arise and exist in the building and provide against such. Or to state the charge in other words, the neglect consisted in installing in a skylight, where a temperature of 155 degrees was a possible condition, sprinkler heads intended to fuse at that temperature.

It is quite clear to my mind that the duties owing to the tenants in the building in this respect by the plaintiff and his assignors and by the defendant were very different.

The defendant owed no general duty to the tenants at all. It owed no duty in respect to the buildings where the sprinklers were installed until it entered into the contract with the Bagley estate, and that contract imposed upon the defendant just such obligations as it assumed and no others.

165 The agreement between the Bagley estate and the tenants was to install "a suitable automatic sprinkler system."

Under that contract the estate could select any system it chose which was suitable to the conditions existing in the buildings.

The estate might very well be presumed to know what the conditions of temperature in the buildings were, and if it did not know them, it was bound to exercise reasonable care to ascertain them. If it negligently installed a system which was not suitable to the building—one which under conditions that were likely to exist would permit the discharge of large quantities of water when there was no fire—it was undoubtedly liable for the damages caused by its own neglect in that respect, and it could not escape liability because it had made a contract with a reputable business concern to install the system.

The defendant, however, made a very different contract. It agreed to install "an approved system" which should be "in conformity with the standard of automatic sprinkler installations of the Improved Risks Commission;" namely, one which should conform with the standard prescribed by the fire insurance companies.

This provision in the defendant's contract was essential to attain the purpose of the agreement between the Bagley estate and their tenants, for the reason that if the system failed to conform to the standard prescribed by the Insurance Companies, reduced rates of insurance premiums could not be obtained.

The limitation of the defendant's obligation did not however stop with the provisions quoted. It was further stipulated "that no obligation other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party."

166 Effect must be given to this provision, and in my opinion it prohibits any liability of the defendant upon any implied covenant or warranty and limits its obligations to those which are expressed.

There is no question in the case but that the system installed conformed to the standard of the insurance companies.

The plaintiff has the burden of proving that it did not. Not only is there no such proof, but it appears undisputedly that the system was approved by the insurance companies; and that upon such approval the Bagley estate paid to the defendant the contract price for the work performed.

When the plan for the installation of the sprinklers was approved by Mr. Jardine as the agent of the Improved Risks Commission, such plan must be deemed to have been incorporated into the defendant's contract and to have become a part thereof; and I agree with the learned counsel for the defendant that the contract must be construed and defendant's liability determined, as if it was specified therein that sprinkler heads intended to fuse at 155 degrees of heat were to be placed in the skylights of the buildings.

The case presented, therefore, is one as to a machine or apparatus specifically designated in a contract which has been installed and delivered in accordance with the stipulations of the contract. It was intended for a special purpose, namely to extinguish fires, and the sprinkler heads were intended to melt and permit the water to escape at the temperature of 155 degrees.

There were no defects in the sprinkler heads and there is no dispute that the apparatus would perform the work which was intended it should perform.

Upon the oral agreement the learned counsel for the plaintiff conceded there were no defects in the materials used, and did
167 not claim that the sprinkler heads in the skylights were poorer in quality than those put in other parts of the building; and he said that he was willing that the Court should find as a fact that they were up to the standard for the sprinkler head which the defendant furnished which was marked 155 degrees.

The defendant therefore discharged its whole obligation which it had assumed under the contract and owed no further duty to the plaintiff and his assignor or to the tenants in the building.

The judgments entered against the plaintiff and his assignors in the Courts of Michigan did not determine in any respect that the defendant was negligent in the performance of its contract and are not therefore binding upon it in this action.

There must be judgment in favor of the defendant in dismissing the complaint upon the merits.

Findings may be settled upon two days' notice.

(Endorsed:) In the Circuit Court of the U. S. for the Southern District of N. Y.—John H. Bagley, against The General Fire Extinguisher Company.—Referee's Opinion.—U. S. Circuit Court, Southern District New York.—Filed Nov. 17, 1905.—John A. Shields, Clerk.

168 United States Circuit Court of Appeals for the Second Circuit.

JOHN N. BAGLEY, Plaintiff in Error,
against
GENERAL FIRE EXTINGUISHER COMPANY, Defendant in Error.

Assignment of Errors.

Now comes before the judges of the United States Circuit Court of Appeals for the Second Circuit, John N. Bagley, plaintiff in error, by Henry B. Closson, his attorney, and says, that in the record and proceedings in the above entitled suit there is manifest error, in this, to wit:

1. That the Court refused to allow the witness Siegmund Simon to answer the following question propounded to him by the plaintiff:

"What instructions, if any, were given to you by the persons who installed the sprinkler system as to the working of this sprinkler device?"

to which the witness was expected to answer, "none."

2. That the Court refused to allow the witness Siegmund Simon to answer the following question propounded to him by the plaintiff:

"What instructions were given to you by the persons who
169 installed the sprinkler apparatus as to what should be done in reference to those ventilators?

to which the witness was expected to answer, "none."

3. That the Court refused to allow the witness George H. Hopkins to answer the following question propounded to him by the plaintiff:

"Did he (Mr. Dawley, the manager of the defendant) make an offer for an adjustment of the damages to the building?

to which the witness was expected to answer, "Yes."

4. That the Court refused to allow the witness George H. Hopkins to answer the following question propounded to him by the plaintiff:

"In consequence of the conversations which you then had with Mr. Dawley was a sum of money paid to you by the defendant for the damage to the building?"

to which the witness was expected to answer, "Yes."

5. That the Court refused to allow the witness John N. Bagley, to answer the following question propounded to him by the plaintiff:

"Upon returning from the building on that occasion, did he (to wit, Mr. Dawley, the manager of the defendant), make a statement to you as to the propriety of placing these 155° heads in the skylights?"

to which the witness was expected to answer, that the manager of the defendant then stated that it was unworkmanlike to have placed the said heads in the said skylights.

170 6. That the Court overruled the objection of the plaintiff, that the same was irrelevant and incompetent as against him, to the report of the witness Jardine, referring to the Burnham-

Stoepel Building, known as "Jardine Exhibit No. 1," and allowed the same to be put in evidence against the plaintiff.

7. That the Court overruled the objection of the plaintiff, that the same was irrelevant and incompetent as against him to the report of the witness Jardine referring to the Peerless Company Building, known as "Jardine Exhibit No. 2," and allowed the same to be put in evidence against the plaintiff.

8. That the following question having been propounded by the defendant to the witness Jardine, to wit:

"Now from your experience, which you have told us of and your inspection of this particular skylight, will you state whether in your judgment it was proper practice to place sprinkler heads in that skylight?"

and the plaintiff having objected to the question on the ground that the witness had not been shown competent to answer it, and on the ground that the matter was not a subject for expert opinion, the Court overruled the objection.

9. That the following question having been propounded by the defendant to the witness Jardine, to wit:

"Now, from your knowledge of the head and its composition, will you state what in your judgment, from your experience, what kind of head, in your judgment would properly be placed in such
171 a skylight as that of Burnham & Stoepel, taking into account, as you have told us, the object of the installation?"

and the plaintiff having objected to the question on the ground that the witness had not been shown competent to answer it, and on the ground that the matter was not a subject for expert opinion, the Court overruled the objection.

10. That the following question having been propounded by the defendant to the witness Jardine:

"Will you state whether or not in your experience you have seen hard heads installed in such a skylight as this?"

and the witness having answered before an objection could be interposed by the plaintiff to the question, that he never had, thereupon the plaintiff, having moved to strike out the answer on the ground that it did not appear that the witness had ever seen a skylight constructed like the one in question with sprinklers in it or without, the Court denied the motion.

11. That the following question having been propounded by the defendant to the witness Jardine, to wit:

"Was such installation (to wit, the erection of 155 degrees sprinkler heads in the skylights in question) in accordance with the usual and ordinary practice of reputable sprinkler companies?"

and the plaintiff having duly objected to the question on the ground that it was incompetent and that it was not material what had been done in other places under other conditions, the Court overruled the objection.

172 12. That the Court overruled the objection of the plaintiff, that the same was incompetent and irrelevant, to the follow-

ing question, propounded by the defendant to the witness William Hallock:

"Assuming that in this skylight, a model of which you have seen, the temperature was taken by Mr. Conant, whose deposition has been read by the plaintiff, under the following circumstances, the outside temperature being about the same as on the day of the accident, the thermometer used by Mr. Conant being a test thermometer, clear glass tube, with no colored glass, with no back to it, about 12 inches long, and assuming that it was hung upon the yoke of the head that burst on the 4th of July, some eight feet from a head which had not exploded at the time the thermometer was hung, the unexploded head being arranged from the top of the pipe and about 8 feet from the exploded head, and that the thermometer showed the temperature to be 146 Fahrenheit; does that reading of that thermometer at 146 indicate what the temperature was upon the solder in the unexploded head?"

12. That, though requested, the Court refused to find as a fact that—

"At the time when the contract with the defendant was made, and thereafter for more than a year, neither of the plaintiff's assignors nor of the managing trustees had any knowledge of the proper construction for the sake of safety of a sprinkler apparatus or the proper mode of arranging it."

13. That, though requested, the Court refused to find as a fact that—

"Neither of the plaintiff's assignors or of the trustees repre-
173 senting them, had anything to do with the preparation of the plans under which the defendant's system was installed, or made any suggestions, or gave any directions to the defendant as to how it should instal it, or what sort of apparatus it should use, or where it should locate it; excepting that the plaintiff objected, upon the ground of its unsightly appearance, to the proposed location of one of the upright pipes on the ground floor of the Burnham & Stoepel building; and in order to allow some machinery to be erected on the fourth floor of the Peerless building, asked the defendants to allow two elbows to be placed in the supply pipe on that floor to make room for the machinery."

14. That, though requested, the Court refused to find as a fact that—

"The plaintiff's assignors, in regard to the propriety and safety of the installation of the sprinkler system, relied upon the reputation of the defendant, with whom they made the contract."

15. That, though requested, the Court refused to find the same as a conclusion of law.

16. That, though requested, the Court refused to find as a fact that—

"The defendant did not complete the erection of its sprinkler system in the building of the plaintiff's assignors until the latter part of September, 1896."

17. That, though requested, the Court refused to find as a fact that—

"At all times during the year 1897 and since there has
174 been maintained in the City of Detroit an office of the United States Weather Bureau situated on the roof of a ten-story building about 600 feet northwesterly from the building of the plaintiff's assignors. Among the instruments maintained there during this period was one which automatically recorded the temperature of the air, in a lattice structure about 15 feet above the roof of the building, sheltered from the rays of the sun, through which the air circulated freely."

18. That, though requested, the Court refused to find as a fact that—

"On the 4th day of July, 1897, the following temperatures were recorded by the instrument of the United States Weather Bureau, sheltered from the sun, but exposed to the free circulation of the air in the structure referred to in the previous finding:

At 10 A. M. Eastern Standard Time, 87° Fahrenheit.
At 11 A. M. Eastern Standard Time, 88° Fahrenheit.
At Noon Eastern Standard Time, 90° Fahrenheit.
At 1 P. M. Eastern Standard Time, 91° Fahrenheit.
At 2 P. M. Eastern Standard Time, 93° Fahrenheit.
At 3 P. M. Eastern Standard Time, 94° Fahrenheit.
At 4 P. M. Eastern Standard Time, 94° Fahrenheit.
At 5 P. M. Eastern Standard Time, 94° Fahrenheit.
At 6 P. M. Eastern Standard Time, 94° Fahrenheit.

175 19. That, though requested, the Court refused to find as a fact that—

"On the 10th day of July, 1897, the following temperatures were recorded by the instrument referred to in the last finding:

At 10 A. M. Eastern Standard Time, 88° Fahrenheit.
At 11 A. M. Eastern Standard Time, 91° Fahrenheit.
At Noon Eastern Standard Time, 91° Fahrenheit.
At 1 P. M. Eastern Standard Time, 92° Fahrenheit.
At 2 P. M. Eastern Standard Time, 92° Fahrenheit.
At 3 P. M. Eastern Standard Time, 93° Fahrenheit.
At 4 P. M. Eastern Standard Time, 93° Fahrenheit.
At 5 P. M. Eastern Standard Time, 93° Fahrenheit.
At 6 P. M. Eastern Standard Time, 92° Fahrenheit.

20. That, though requested, the Court refused to find as a fact that—

"On the 1st day of July, 1901, the following temperatures were recorded by the instrument referred to in the last finding:

At 10 A. M. Eastern Standard Time, 88° Fahrenheit.
At 11 A. M. Eastern Standard Time, 90° Fahrenheit.
At Noon Eastern Standard Time, 92° Fahrenheit.
At 1 P. M. Eastern Standard Time, 92° Fahrenheit.
176 At 2 P. M. Eastern Standard Time, 93° Fahrenheit.
At 3 P. M. Eastern Standard Time, 93° Fahrenheit.
At 4 P. M. Eastern Standard Time, 93° Fahrenheit.
At 5 P. M. Eastern Standard Time, 93° Fahrenheit.
At 6 P. M. Eastern Standard Time, 94° Fahrenheit.

21. That, though requested, the Court refused to find as a fact that—

"On the 2d day of July, 1901, the following temperatures were recorded by the instrument referred to in the last finding:
At 10 A. M. Eastern Standard Time, 78° Fahrenheit.
At 11 A. M. Eastern Standard Time, 80° Fahrenheit.
At Noon Eastern Standard Time, 83° Fahrenheit.
At 1 P. M. Eastern Standard Time, 86° Fahrenheit.
At 2 P. M. Eastern Standard Time, 87° Fahrenheit.
At 3 P. M. Eastern Standard Time, 88° Fahrenheit.
At 4 P. M. Eastern Standard Time, 89° Fahrenheit.

22. That, though requested, the Court refused to find as a fact that—

"The temperature indicated by a record of 94° by the instruments of the United States Weather Bureau at their office in the City of Detroit, is not an unusual or extraordinary temperature in the City of Detroit during the summer months."

23. That, though requested, the Court refused to find as a fact that—

"In the City of Detroit it is usual to have temperatures ranging about from 90 to 96° Fahrenheit in the shade every summer under ordinary circumstances."

24. That, though requested, the Court refused to find as a fact that—

"The building of the plaintiff's assignors in which the defendant's sprinkler system was installed was a five-story building, about 68 feet high (Jardine's Report), consisting of two parts, one known as the Burnham-Stoepel Building, and the other as the Peerless Manufacturing Company's building."

25. That, though requested, the Court refused to find as a fact that—

"In the roof of the Burnham-Stoepel building, and likewise in the roof of the Peerless Manufacturing Company building, was a skylight, each consisting of wooden frame work supporting panes of heavy cathedral glass, these constituting an inverted V-shaped roof running east and west, and a horizontal floor substantially on the same level as the ceiling of the fifth floor, likewise consisting of panes of glass."

26. That, though requested, the Court refused to find as a fact that—

"The interior length of the Peerless skylight was about 19 feet, 10 inches; that of the Burnham-Stoepel skylight 18 feet. The interior height of the Peerless skylight, from the floor to the apex of the roof, was about 4 feet, 3 inches; that of the Burnham-Stoepel skylight about 4 feet, 6 inches. The interior width of both skylights was about 11 feet, 8 inches. The length of both ran east and west."

27. That, though requested, the Court refused to find as a fact that—

"As a part of its sprinkler system the defendant carried a vertical water pipe into each of the skylights in question through the glass floor, and connected this with a horizontal pipe running nearly under the ridge pole of the skylight. On this horizontal piece of pipe there were placed two 155° sprinkler heads about 10 feet apart, projecting

upwards. The opening of each was about 5 inches below the bottom of the ridge pole of the skylight."

28. That, though requested, the Court refused to find as a fact that—

"Each skylight was fitted with a ventilating pipe about 10 inches in diameter attached to the end of the skylight and turning upwards terminating in a water hood."

29. That, though requested, the Court refused to find as a fact that—

"The condition of each of these skylights as it existed during the period while the defendant was erecting its sprinkler system, remained the same without change until after July 1st, 1901."

179 30. That, though requested, the Court refused to find as a fact that—

"On the 10th day of July, 1897, a test thermometer hung upon the yoke of the sprinkler head in the Peerless skylight which on the 4th day of July previous had fused, with a bright bulb exposed to the sun, showed the following temperatures:

At 11.55 A. M., 120° Fahrenheit.
At Noon, 127° Fahrenheit.
At 12.10 P. M., 128° Fahrenheit.
At 12.30 P. M., 142° Fahrenheit.
At 1 P. M., 144° Fahrenheit.
At 1.30 P. M., 146° Fahrenheit.
At 2 P. M., 146° Fahrenheit.
At 2.30 P. M., 145° Fahrenheit.
At 3 P. M., 142° Fahrenheit.
At 3.30 P. M., 139° Fahrenheit.
At 4 P. M., 133½° Fahrenheit.
At 4.30 P. M., 129½° Fahrenheit.

31. That, though requested, the Court refused to find as a fact that—

"On July 10th, 1897, between noon and 2:30 P. M., a sprinkler head in the Peerless skylight which had not fused on the 4th day of July, 1897, fused under the heat of the sun."

32. That, though requested, the Court refused to find as a fact that—

"On July 1st, 1901, the same test thermometer similarly placed in the Burnham-Stoepel skylight, exposed to the sun, showed the following temperatures:

At 10.15 A. M., Central Standard Time, 142° Fahrenheit.

180 At 1.30 P. M., Central Standard Time, 145° Fahrenheit.

33. That, though requested, the Court refused to find as a fact that—

"On July 2d, 1901, at 11 A. M., the same thermometer in the same place showed a temperature of 140° Fahrenheit."

34. That, though requested, the Court refused to find as a fact that—

"On July 6th, 1901, the same test thermometer placed in the skylight indicated a temperature at 10.15 A. M. of 123°; and on being removed to the floor directly below the skylight the mercury in the thermometer fell 20° in one minute."

35. That, though requested, the Court refused to find as a fact that—

"In the basement of the Burnham-Stoepel building was a boiler room containing two tubular boilers furnishing steam. The temperature of the skylights in question on a bright sunny day in summer is higher than that of the boiler room."

36. That, though requested, the Court refused to find as a fact that—

"The sprinkler system extended into the boiler room in the Burnham-Stoepel building. The sprinkler heads installed there by the defendant were marked 286° and were designed to fuse at a temperature not below 280° F. The installation of these heads in the boiler room in question was approved by the Improved Risk
181 Commission and by Robert Jardine, the inspector, who, on their behalf, inspected the buildings after the completion of the system."

37. That, though requested, the Court refused to find as a fact that—

"The bottom of each of the skylights in question was completely enclosed by a glass floor except for a space of about 2 feet in diameter made by taking out two or three of the panes of glass."

38. That, though requested, the Court refused to find as a fact that—

"The two skylights in question in the building of the plaintiff's assignors differed from any which had been previously examined by the inspector of the Improved Risk Commission, in having the glass floor in question."

39. That, though requested, the Court refused to find as a fact that—

"The approval by the Improved Risk Commission of the practice of installing 155° — under skylights was based upon the assumption that under regular conditions, in the absence of a glass floor to the skylight, the temperature should be about the same throughout the entire room."

40. That, though requested, the Court refused to find as a fact that—

"It was the object of the inspection on behalf of the Improved Risk Commission of the sprinkler system installed by the
182 defendant, to ascertain that the system was in such condition that it would go off in case of a fire and as nearly after the starting of a fire as possible."

41. That, though requested, the Court refused to find as a fact that—

"The more easily the sprinkler heads would fuse the better they served the interest of the Improved Risk Commission. It would occasion no loss to the Improved Risk Commission or the Fire Insurance Companies concerned in it if the sprinklers of the defendant's system should be so easily fusible as to fuse even when there was no fire in the building."

42. That, though requested, the Court refused to find as a fact that—

"After obtaining from the plaintiff's assignors the acceptance of its bid for the erection of its sprinkler system, the defendant made certain plans showing the details of the construction of the system to be installed. These plans did not show what kind of sprinkler heads were to be placed in the skylights."

43. That, though requested, the Court refused to find as a fact that—

"The inspector employed by the Improved Risk Commission, upon whose report the Commission approved the system installed by the defendant, did not in inspecting the building examine the sprinkler heads installed in the skylight of the Peerless building, nor more than one of those installed in the skylight in the Burnham-Stoepel building."

183 44. That, though requested, the Court refused to find as a fact that—

"The inspector employed by the Improved Risk Commission, upon whose report the Commission approved the system installed by the defendant, did not in inspecting the building examine the sprinkler heads installed by the defendant in the boiler room over the boilers."

45. That, though requested, the Court refused to find as a fact that—

"The inspector employed by the Improved Risks Commission, upon whose report the Commission approved the system installed by the defendant, had never before seen any part of a sprinkler system installed in a skylight, the bottom of which was enclosed in a glass floor."

46. That, though requested, the Court refused to find as a fact that—

"Good workmanship in installing the defendant's sprinkler system required that there should be a margin of about 30° between the temperature at which each sprinkler head erected by it should be designed to fuse and the highest temperature likely to be reached in the place in which it should be erected."

47. That, though requested, the Court refused to find as a fact that—

"The inspector of the Improved Risks Commission, upon whose report the Commission approved the system installed by the defendant, would not again approve a sprinkler system consisting
184 in part of sprinkler heads, in either of the skylights in the building in question designed to fuse at 155° Fahrenheit."

48. That, though requested, the Court refused to find as a fact that—

"Sprinkler heads are made to fuse at varying degrees of temperature from 155° up to about 300°."

49. That, though requested, the Court refused to find as a fact that—

"The temperature of the sprinkler heads installed by the defendant in the skylights in question when exposed to the rays of the sun, would be from 15° to 30° higher than the temperature which might be indicated by a thermometer with a bright bulb similarly exposed in the same place; owing to the fact that much of the heat

which would be reflected by the bright bulb of the thermometer would be absorbed by the sprinkler head with its comparatively dull surface."

50. That, though requested, the Court refused to find as a fact that—

"The temperature of the sprinkler heads installed by the defendant in the skylights of the building in question on both July 4th and July 10th, 1897, went above 155° Fahrenheit."

51. That, though requested, the Court refused to find as a fact that—

"The proposal for the erection of the defendant's sprinkler system in the building of plaintiff's assignors, which was accepted
185 by them, was made by one Byron W. Dawley, the General Manager of the defendant's business in that territory, having an office at Chicago, Illinois, who had been engaged in the business successively as Foreman, Superintendent and Manager for some twenty-five years, having charge of the installations of defendant's system, the making of plans for them and the mechanical construction of the work."

52. That, though requested, the Court refused to find as a fact that—

"During the installation of the defendant's system in the building of the plaintiff's assignors, the latter did not, nor did any of them, exercise any supervision over the work or have anything to do with the preparation of the plans for it."

53. That, though requested, the Court refused to find as a fact that—

"The plans and specifications for the installation of the defendant's system in the building in question were prepared in the office of the General Manager of the defendant at Chicago, Illinois."

54. That, though requested, the Court refused to find as a fact that—

"Under proper and ordinary conditions, the sprinkler heads of the defendant's system are supposed and designed not to fuse or open except in case of fire."

186 55. That, though requested, the Court refused to find as a fact that—

"Before making his proposition for the erection of the defendant's sprinkler system in the building in question the General Manager of the Chicago office of the defendant examined the building, including the skylights."

56. That, though requested, the Court refused to find as a fact that—

"The first time consideration was given by the General Manager of the defendant to the question of the proper degree of fusibility for sprinkler heads to be erected in the skylights in the building in question, was immediately after the fusing of two of them on July 4, 1897."

57. That, though requested, the Court refused to find as a fact that—

"The General Manager of the Chicago office of the defendant

would not locate or permit the location of a sprinkler head designed to fuse at 155° in a place the temperature of which was likely to reach over 135° F."

58. That, though requested, the Court refused to find as a fact that—

"It was not thorough or workmanlike work to erect in the skylights in question 155° sprinkler heads."

59. That, though requested, the Court refused to find the same as a conclusion of law.

187 60. That, though requested, the Court refused to find as a fact that—

"It was not thorough or workmanlike work to erect in the skylights in question 155° sprinkler heads unless reasonable care was first taken to ascertain the temperature to which they would be likely to be heated by the rays of the sun."

61. That, though requested, the Court refused to find the same as a conclusion of law.

62. That, though requested, the Court refused to find as a fact that—

"The defendant did not at any time before July 4th, 1897, make any reasonable effort, if any, or exercise reasonable care, if any, to determine the temperature to which the sprinkler heads installed or to be installed by it in the skylights in question would be raised by the heat of the sun."

63. That, though requested, the Court refused to find the same as a conclusion of law.

64. That, though requested, the Court refused to find as a fact that—

"If the defendant had made any reasonable effort or used any reasonable care to ascertain the temperature to which the sprinkler heads installed or to be installed by it in the skylights in question would be raised by the heat of the sun, it would have ascertained that the sprinkler heads would in the summer be exposed to a heat of over 140° of the air immediately surrounding them and become heated themselves to a temperature of 15° to 20° higher."

188 65. That, though requested, the Court refused to find the same as a conclusion of law.

66. That, though requested, the Court refused to find as a fact that—

"The sprinkler system installed by the defendant in the building of the plaintiff's assignors was a dangerous appliance, in that the sprinkler heads in the skylights were liable to be raised by the heat of the sun alone to a temperature at which they would fuse, and in fusing automatically precipitate the water contained in the piping and the tank connected with it upon the building and its contents, until the flow of water should be stopped by some human agency."

67. That, though requested, the Court refused to find the same as a conclusion of law.

68. That, though requested, the Court refused to find as a fact that—

"In and by its contract with the plaintiff's assignors the defendant

agreed to equip their property with 'an approved system of fire extinguisher apparatus' and thereby agreed that the system which it would install should be reasonably adapted to the purpose of discharging the water contained in it upon the building and its contents in case a fire should break out in the building and only in that case."

69. That, though requested, the Court refused to find the same as a conclusion of law.

70. That, though requested, the Court refused to find as a fact that—

"The system installed by the defendant was not reasonably adapted to the purpose of discharging the water upon the
189 building and its contents in case a fire should break out in the building and only in that case."

71. That, though requested, the Court refused to find the same as a conclusion of law.

72. That, though requested, the Court refused to find as a fact that—

"In and by its contract with the plaintiff's assignors the defendant agreed that the material used by it in the erection of its sprinkler system should be of the class best fitted for the purpose which it was designed to serve."

73. That, though requested, the Court refused to find the same as a conclusion of law.

74. That, though requested, the Court refused to find as a fact that—

"One purpose which the material of which the sprinkler heads erected by the defendant in the skylights in question was designed to serve, was to prevent, except in case of a fire in the building, the water in the pipes from being discharged upon the building or its contents."

75. That, though requested, the Court refused to find the same as a conclusion of law.

76. That, though requested, the Court refused to find as a fact that—

"The fusible metal of which the sprinkler heads erected in the skylights in question were in part composed did not belong to
190 the class of material best adapted to the purpose of preventing, except in case of a fire in the building, the water in the pipes from being discharged upon the building or its contents."

77. That, though requested, the Court refused to find the same as a conclusion of law.

78. That, though requested, the Court refused to find as a fact that—

"It was not workmanlike work to erect in the skylights in question sprinkler heads which would fuse when there was no fire in the building but only the heat caused by the rays of the sun."

79. That, though requested, the Court refused to find the same as a conclusion of law.

80. That, though requested, the Court refused to find as a fact that—

"Metal which would fuse in the skylights in question at the temperature to which it would be heated by the rays of the sun alone, was not first-class material."

81. That, though requested, the Court refused to find the same as a conclusion of law.

82. That, though requested, the Court refused to find as a fact that—

"Workmanlike work on the part of the defendant in erecting its sprinkler system required it to leave a margin of safety of some 30° between the temperature at which each sprinkler head would fuse and the temperature to which it might be raised by the heat of the sun alone."

191 83. That, though requested, the Court refused to find as a fact that—

84. That, though requested, the Court refused to find as a fact that

"During the first week of the first July after the completion of the erection of the sprinkler system by the defendant in the building in question, two of the four sprinkler heads erected by the defendant in the skylights in question; and during the second week of the same July another of the four, were raised by the heat of the sun alone to a temperature at which they fused."

85. That, though requested, the Court refused to find as a fact that

"It was not workmanlike work on the part of the defendant to erect in the skylights in question 155° heads unless it should first take reasonable care to ascertain the temperature to which they would be there exposed by the heat of the sun alone."

86. That, though requested, the Court refused to find the same as a conclusion of law.

87. That, though requested, the Court refused to find as a fact that—

"If the defendant had taken reasonable care to ascertain the temperature to which the sprinkler heads erected by it in the skylights in question might be raised by the heat of the sun alone, it would have ascertained that that temperature might probably be the same as that at which the heads were designed to fuse."

192 88. That, though requested, the Court refused to find the same as a conclusion of law.

89. That, though requested, the Court refused to find as a fact that—

"The plaintiff did not stipulate, nor did the defendant agree, that any sprinkler heads whatever should be erected in either of the skylights in question."

90. That, though requested, the Court refused to find the same as a conclusion of law.

91. That, though requested, the Court refused to find as a fact that—

"In and by the Michigan judgments viz: the judgments recovered against the Estate of John J. Bagley, in the Circuit Court of the County of Wayne, in the State of Michigan, one on the 26th day

of February, 1900, in favor of the Peerless Manufacturing Company for the sum of $4,696.16, and one on the 10th day of June, 1901, in favor of The United States Casualty Co. for the sum of $18,444.40] it was adjudged that the defendant did not exercise reasonable care in erecting its sprinkler system to ascertain whether the sprinkler heads erected by it in the skylights in question would by the heat of the sun alone be raised to the temperature at which they were designed to fuse."

92. That, though requested, the Court refused to find the same as a conclusion of law.

193 93. That, though requested, the Court refused to find as a fact that—

"In and by the Michigan judgments it was adjudged that it was the duty of the plaintiff's assignors and of their contractor, the defendant, to exercise reasonable care in erecting its sprinkler system to ascertain whether the sprinkler heads erected by it in the skylights in question would, by the heat of the sun alone, be raised to the temperature at which they were designed to fuse."

94. That, though requested, the Court refused to find the same as a conclusion of law.

95. That, though requested, the Court refused to find as a fact that—

"In and by the Michigan judgments it was adjudged that the metal of which the sprinkler heads erected by the defendant in the skylights in question were in part composed, was designed by it to fuse at a temperature which it ought reasonably to have been anticipated would be reached in the skylights without other heat than that of the rays of the sun in summer."

96. That, though requested, the Court refused to find the same as a conclusion of law.

97. That, though requested, the Court refused to find as a fact that—

"In and by the Michigan judgments it was adjudged that it was negligence on the part of the persons doing the work to place these 155° sprinkler heads in the skylights in question."

194 98. That, though requested, the Court refused to find the same as a conclusion of law.

99. That, though requested, the Court refused to find as a fact that

"In and by the Michigan judgments it was adjudged that the fusible metal employed by the defendant in the sprinkler heads erected by it in the skylights in question was not first-class or suitable material for the purpose which it was there designed to serve."

100. That, though requested, the Court refused to find the same as a conclusion of law.

101. That, though requested, the Court refused to find as a fact that—

"In and by the Michigan judgments it was adjudged that the erection in the skylights in question of a sprinkler system, the water of which was prevented from escaping only by materials which would

fuse under the heat of the sun in summer, was not workmanlike work."

102. That, though requested, the Court refused to find the same as a conclusion of law.

103. That, though requested, the Court refused to find as a conclusion of law that—

"By erecting a sprinkler system which was approved by the Improved Risk Commission, the defendant did not perform its contract unless its system was also so erected that when subjected to no heat but that of the sun it would safely retain the water contained in it so far as that result could be insured by thorough and workmanlike work in the erection of the system and the use in it of materials each of the first-class for the purpose which it was intended to serve."

104. That, though requested, the Court refused to find as a conclusion of law that—

"Impossibility, if it were proved, of erecting a sprinkler system which would retain the water contained in it when subjected to no heat but that of the sun and would at the same time obtain the approval of the Improved Risk Commission, would not excuse the defendant for breach of a contract to erect such a system."

105. That, though requested, the Court refused to find as a conclusion of law that—

"It was not impossible for the defendant to erect a system which would retain the water contained in it when subjected to no heat but that of the sun and would at the same time obtain the approval of the Improved Risk Commission.

106. That, though requested, the Court refused to find as a conclusion of law that—

"The inspection of the defendant's sprinkler system by the Improved Risk Commission was conclusive only as to its effectiveness as a means of extinguishing fire, and did not bear upon the question whether the materials of which it was composed were first-class or the work of erecting it done in a thorough or workmanlike manner, or whether the sprinkler system was reasonably safe to retain the water it contained when subjected to the heat of the sun alone."

107. That, though requested, the Court refused to find as a conclusion of law that—

"The defendant's agreement that the material used by it in the sprinkler system should be first-class and the work done by it in erecting it should be thorough and workmanlike, was, so far as it related to the defects which caused the flooding of the building on July 4th, 1897, a warranty which survived acceptance."

108. That, though requested, the Court refused to find as a conclusion of law that—

"The defects in the defendant's sprinkler system which caused the flooding of the building on July 4th, 1897, were, so far as concerned the plaintiff's assignors, latent defects against which the defendant warranted its structure, and for the loss caused by which the remedy survived acceptance."

109. That, though requested, the Court refused to find as a conclusion of law that—

"It was the duty of the defendant to the plaintiff's assignors in erecting its sprinkler system to use reasonable care and skill so to select its materials for its sprinkler heads and so to locate the sprinkler heads that they would not fuse and discharge the water retained by them, when exposed to no heat but that of the sun."

110. That, though requested, the Court refused to find as a conclusion of law that—

"It was the duty both of the plaintiff's assignors and of the defendant to the tenants of the building in erecting the
197 sprinkler system to use reasonable care and skill so to select the materials for the sprinkler heads and so to locate the sprinkler heads that they would not fuse and discharge the water retained by them when exposed to no heat but that of the sun."

111. That, though requested, the Court refused to find as a conclusion of law that—

"The defendant did not use reasonable care of skill so to select its materials for its sprinkler heads that they would not fuse and discharge the water retained by them when exposed to no heat but that of the sun."

112. That, though requested, the Court refused to find as a conclusion of law that—

"The defendant did not use reasonable care or skill so to select the sprinkler heads forming a part of its system that these heads would not fuse and discharge the water retained by them when exposed to no heat but that of the sun."

113. That, though requested, the Court refused to find as a conclusion of law that—

"As between the plaintiff's assignors and the defendant, the duty referred to in the last three assignments primarily devolved upon the defendant; and if by a breach of it the plaintiff's assignors were held liable to the tenants for the consequent damages in a suit which the defendant was duly notified of and allowed the opportunity to
defend, the defendant became liable over to the plaintiff's
198 assignors to make good the loss thereby occasioned to them, although the defendant may not have been directly liable to the tenants themselves."

114. That, though requested, the Court refused to find as a conclusion of law that—

"By virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that the tenants of the plaintiff's assignors were not guilty of any negligence contributing to the loss, for the damage by which they recovered in the Michigan suits."

115. That, though requested, the Court refused to find as a conclusion of law that—

"By virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that it was negligent workmanship to erect in the skylights in question the 155° sprinkler heads."

116. That, though requested, the Court refused to find as a conclusion of law that—

"By virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that it was negligent to use as a material for the sprinkler heads in the skylights in question solder which was designed to fuse and would fuse at the temperature at which it did there fuse on the 4th day of July, 1897."

199 117. That, though requested, the Court refused to find as a conclusion of law that—

"By virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that the sprinkler system of the defendant was erected in a negligent and careless manner, and that such negligence and carelessness in the erection of the defendant's sprinkler system was the proximate cause of the damages to the tenants of the plaintiff's assignors for which the tenants recovered in the Michigan suit."

118. That, though requested, the Court refused to find as a conclusion of law that—

"By virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that the

damages occasioned to the plaintiff's assignors by the negligent manner in which the defendant's sprinkler system was erected include the amount paid by the plaintiff's assignors in satisfaction of the Michigan judgments."

119. That, though requested, the Court refused to find as a conclusion of law that—

"The negligence and carelessness with which it was by the Michigan judgments adjudicated that the defendant's system was erected consisted of certain methods which the defendant voluntarily and of its own choice adopted to perform the obligations of its

200 contracts with the plaintiff's assignors, and not in anything which it was obliged by the terms of its contract to do in order to perform such obligations."

120. That, though requested, the Court refused to find as a conclusion of law that—

"Nothing in the defendant's contract with the plaintiff's assignors called for or excused the negligence or carelessness with which it was by the Michigan judgments adjudged that the defendant's sprinkler system was erected."

121. That, though requested, the Court refused to find as a conclusion of law that—

"The plaintiff is entitled to judgment against the defendant for the amounts paid by the plaintiff's assignors in satisfaction of the Michigan judgments."

122. That, though requested, the Court refused to find as a conclusion of law that—

"The plaintiff is likewise entitled to judgment against the defendant for interest upon the amounts paid by the plaintiff's assign-

ors in satisfaction of the Michigan judgments from the several dates on which the said sums were paid."

123. That, though requested, the Court refused to find as a conclusion of law that—

"The plaintiff is likewise entitled to judgment against the defendant for the sum of Two thousand two hundred and seventy-seven and 94/100 dollars ($2,277.94) paid by it for counsel fees and other necessary expenses, all of which were reasonable and
201 proper in amount in the defense of the Michigan suits."

124. That, though requested, the Court refused to find as a conclusion of law that—

"The plaintiff is further likewise entitled to judgment against the defendant for interest upon the said sum of Two thousand two hundred and seventy-seven and 94/100 dollars ($2,277.94) from the 14th day of February, 1902, upon which date the said payment was made."

125. That the Court found as a fact (in the fifth finding of fact)—

"that the system of fire extinguisher apparatus with which the defendant equipped the said property was an approved system; that the defendant for so much of the said system as was installed in the skylights in the said building supplied the materials and performed the labor described and enumerated in the specifications annexed to the agreement."

126. That the Court found as a fact (in the sixth finding of fact)—

"that the materials furnished by the plaintiff for so much of the system as was installed in the said skylights were first-class and that the said work done in the said skylights was done in a thorough and workmanlike manner and in conformity with the Improved Risks Commission Standard."

202 127. That the Court found as a fact (in the seventh finding of fact)—

"that the purpose of the inspection by the Improved Risks Commission included the purpose of ascertaining the condition and fitness of any sprinkler devices installed therein for retaining the water in the pipes of the system when there should be no fire in the building."

128. That the Court found as a fact (in the eighth finding of fact)—

"that the purpose on the part of the said 'Estate of John J. Bagley' was to obtain increased fire protection solely and not also protection against the danger of flooding the building by water when there should be no fire in the building."

129. That the Court found as a fact (in the eleventh finding of fact)—

"that the said plans designated that the said sprinkler heads to be located in the skylights were ordinary heads, and that there was thereby meant those intended to fuse at 155° Fahrenheit."

130. That the Court found as a fact (in the twelfth finding of fact)—

"that the inspection referred to included anything more than the manner in which sprinkler heads were placed in one of the skylights."

131. That the Court found as a fact (in the fourteenth finding of fact)—

"that it was proper practice at the time to place in the skylights in question sprinkler heads intended to fuse at 155° Fahren-
203 heit."

132. That the Court found as a fact (in the fourteenth finding of fact)—

"that had other heads than those intended to fuse at 155° Fahrenheit, been placed in the skylights the same would have been ordered out by the said inspector."

133. That the Court found as a fact (in the sixteenth finding of fact)—

"that there was an extraordinary degree of heat in the skylights at the time of the fusing; and that that was the reason why said sprinkler heads fused, and that the fusing was not because there were defects in the materials used and in the installation aforesaid, and because the sprinkler heads fused at a lesser degree of heat than that at which they were intended to fuse."

134. That the Court found as a fact (in the seventeenth finding of fact)—

"that the temperature in said skylights at the time in question, reached 155° Fahrenheit; that the sprinkler heads which fused were up to the standard for such sprinkler heads, and that the sprinkler heads which fused did not fuse at less than 155° Fahrenheit."

135. That the Court found as a fact (in the eighteenth finding of fact)—

"that the temperature in the said skylights at the time of said fusing was extraordinary; that there were other extraordinary phys-
204 ical conditions in and about said skylights and lack of draughts of air therein; that the extraordinary physical conditions, the lack of draughts of air and the extraordinary temperature caused the fusing of the said sprinkler heads."

136. That the Court found as a fact (in the eighteenth finding of fact)—

"that the conditions which caused the fusing of the said sprinkler heads—the erection of them in the skylights and the exposure of them to the heat normally prevailing there in the summer—was not caused by the defendant and was not the fault of the defendant."

137. That the Court found as a fact (in the twenty-second finding of fact)—

"that the action brought by the Peerless Manufacturing Co. against the Estate of John J. Bagley in the Circuit Court of Wayne County

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in the State of Michigan was not defended by the defendant jointly with the said 'Estate of John J. Bagley'."

138. That the Court found as a fact (in the twenty-seventh finding of facts)—

"that the actions, brought by The Peerless Manufacturing Company and the United States Casualty Company, and the proceedings therein, and the judgments obtained thereon, did not adjudicate the liability of this defendant, the General Fire Extinguisher Company, to the plaintiff herein, or to his assignors, the said 'Estate of John J. Bagley'."

205 139. That the Court found as a fact (in the twenty-eighth finding of fact)—

"that the aforesaid actions, brought by the Peerless Manufacturing Company and The United States Casualty Company, and the proceedings therein, and the judgments obtained thereon, did not construe or adjudicate the agreement in question; between this defendant and the said 'Estate of John J. Bagley' or the acts of the defendant under said agreement."

140. That the Court found as a conclusion of law (in the first conclusion of law)—

"that no other duties or obligations than those expressed in the said agreement were owing in the premises by the defendant to the said Estate of John J. Bagley."

141. That the Court found as a conclusion of law (in the first conclusion of law)—

"that the defendant did not owe to the said Estate of John J. Bagley the duty and obligation to use reasonable care and skill

(*a.*) Before installing sprinkler heads designed to fuse at 155° Fahrenheit in said skylights to ascertain the temperature to which they would be likely to be there heated by the rays of the sun, and to ascertain whether or not such temperature would exceed that at which the sprinkler heads were designed to fuse.

(*b.*) To install a system, such and so, that it should be reasonably adapted to the purpose of discharging the water contained in
206 it upon the building and its contents in case a fire should break out in the building, and only in that case.

(*c.*) So to select its materials for its sprinkler heads and so to locate the sprinkler heads that they would not fuse and discharge the water retained by them when exposed to no heat but that of the sun."

142. That the Court found as a conclusion of law (in the second, sixth and seventh conclusions of law)—

"that the defendant did not assume the duties and obligations set forth in the foregoing assignment of error numbered 141:

(*a.*) To the said Peerless Manufacturing Company.

(*b.*) To the said Burnham Stoepel Company.

(*c.*) To the said United States Casualty Company, insurers of Burnham-Stoepel Company.

(*d.*) To the said 'Estate of John J. Bagley.' "

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143. That the Court found as a conclusion of law (in the thi
conclusion of law)—

"That it performed and fulfilled all of the obligations in said agre
ment, set forth in the said third finding of fact, on its part to
performed and fulfilled."

144. That the Court found as a conclusion of law (in the thir
sixth and seventh conclusions of law)—

"that the defendant performed and fulfilled of the obligations in sai
agreement any of the following:

207 (*a.*) To equip the said property with an improved syste
of fire extinguisher apparatus.

(*b.*) To install a system reasonably adapted to the purpose
discharging the water contained in it upon the building and i
contents in case a fire should break out in the building, and only i
that case.

(*c.*) To use in the sprinkler heads erected by it in the skyligh
material reasonably fit and of the class best fitted for the purpose
fusing if a fire should break out in the building, and if not to pr
vent the water in the pipes from being discharged upon the buildin

(*d.*) To do its work in a thorough and workmanlike manner i
selecting and locating its sprinkler heads so that not only would the
fuse in case a fire should break out in the building, but would n
fuse when exposed to no heat but that of the rays of the sun.

(*e.*) Before erecting in the skylights in question sprinkler hea
designed to fuse at 155° Fahrenheit, to take reasonable care
ascertain whether or not in the position in which the defenda
placed them they would be raised to that temperature by the he
of the sun alone."

145. That the Court found as a conclusion of law (in the fourt
conclusion of law)—

"That the fusing, melting and opening of the sprinkler heads,
certain of them, in the said skylights on the 4th day of July, 189
without any fire in the said building, and the releasing
208 the water in certain of the pipes and tanks connected wit
said sprinkler heads and furnished and erected by the d
fendant as a part of its system of automatic sprinklers, and th
flowing of water in consequence thereof, and any damages caus
thereby, were not due to, or caused by, any breach of duty on th
part of the defendant herein, or because of any failure on the pa
of the defendant herein to perform the obligations in the aforesa
agreement, expressed in the 143rd Assignment of Error herein,
imposed upon the defendant by said agreement, or assumed by
thereunder; and were not the fault of, or because of any negligen
or breach of warranty on the part of this defendant and that th
defendant is not liable therefor."

146. That the Court found as a conclusion of law (in the four
conclusion of law)—

"That the opening of the said sprinkler heads and the flowing
water in consequence thereof, and the damages thereby caused, w
not due to or caused by

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(*a.*) The breach of some or all of the duties and obligations on the part of the defendant specified above in assignment numbered 141; and the negligence of the defendant in failing to perform such duties and obligations.

(*b.*) Because of the failure on the part of the defendant herein to perform the obligations in the aforesaid agreement, specified above in assignment numbered 144; and the breach of warranty on the part of the defendant in failing so to perform them."

209 147. That the Court found as a conclusion of law (in the fifth conclusion of law)—

"That the judgments rendered against the said 'Estate of John J. Bagley,' in the Courts of Michigan, or in the said actions brought by the United States Casualty Company and The Peerless Manufacturing Company, did not adjudicate that the opening of the said sprinkler heads, as described in the foregoing assignments of error numbered 145 and 146, and the consequent damages, were the fault of this defendant, or caused by any breach of duty, or failure to perform and fulfill any of the obligations in the aforesaid agreement expressed, or imposed thereby, upon this defendant, or assumed by it; and did not adjudicate any liability on the part of this defendant to the said 'Estate of John J. Bagley,' or any others, for the said damages; and did not determine, in any respect, that the defendant herein was negligent; and the said judgments are not binding upon The General Fire Extinguisher Company in this action."

148. That the Court found as a conclusion of law (in the fifth conclusion of law)—

"That the said judgments did not adjudge—

(*a*) That the defendant did not exercise reasonable care in erecting its sprinkler system to ascertain whether the sprinkler heads erected by it in the skylights in question would, by the heat of the sun alone, be raised to the temperature at which they were designed to fuse.

210 (*b*) That it was the duty both of the said 'Estate of John J. Bagley' and of their contractor, the defendant, to exercise reasonable care in erecting the sprinkler system to ascertain whether the sprinkler heads erected by it in the skylights in question would by the heat of the sun alone be raised to the temperature at which they were designed to fuse.

(*c*) That the metal of which the sprinkler heads erected by the defendant in the skylights in question were in part composed was designed by it to fuse at a temperature which it ought reasonably to have been anticipated would be reached in the skylights without other heat than that of the rays of the sun in summer.

(*d*) That it was negligence on the part of the persons doing the work to place 155-degree sprinkler heads in the skylights in question.

(*e*) That the fusible metal employed by the defendant in the sprinkler heads erected by it in the skylights in question was not first-class or suitable material for the purpose which it was there designed to serve.

(*f*) That the erection in the skylights in question of a sprinkler

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system, the water in which was prevented from escaping only by materials which would fuse under the heat of the sun in summer, was not workmanlike work."

149. That the Court found as a conclusion of law (in the fifth and sixth conclusions of law):

"That it is not in this suit *res adjudicata* by the said judgments, by virtue of the provisions of Section 1 of Article IV of the
211 Constitution of the United States, and that the said judgments were not binding upon the defendant in this action as adjudications:

(*a*) That the tenants of the 'Estate of John J. Bagley' were not guilty of any negligence contributing to the loss for the damages by which they recovered in the Michigan suits.

(*b*) That it was negligent workmanship to erect in the skylights in question the 155-degree sprinkler heads.

(*c*) That it was negligent to use as material for the sprinkler heads erected in the skylights in question solder which was designed to fuse and would fuse at the temperature at which it did there fuse on the 4th day of July, 1897.

(*d*) That the sprinkler system of the defendant was erected in a negligent and careless manner, and that such negligence and carelessness in the erection of the defendant's sprinkler system was the proximate cause of the damages to the tenants of the 'Estate of John J. Bagley' for which they recovered in the Michigan suits.

(*e*) That the damages occasioned to the 'Estate of John J. Bagley' by the negligent manner in which the defendant's sprinkler system was erected included the amount paid by the said estate in satisfaction of the Michigan judgments.

212 150. That the Court found as a conclusion of law (in the eighth conclusion of law):

"That the defendant is entitled to judgment herein, dismissing the complaint herein, upon the merits, with costs."

151. That the Court denied the motion for a new trial duly made, pursuant to a rule of this Court promulgated on the 5th day of February, 1877, by the plaintiff before the entry of judgment herein upon his case on appeal and exceptions.

Dated New York, November 14, 1905.

PARSONS, CLOSSON & McILVAINE,
Attorneys for Plaintiff in Error.

(Endorsed:) U. S. Circuit Court of Appeals, For the Second Circuit.—John N. Bagley, Plaintiff in Error, against General Fire Extinguisher Co., Defendant in Error.—Assignment of Errors.—Parsons, Closson & McIlvaine, Attorneys for Plaintiff, 52 William Street, New York City.—U. S. Circuit Court, Southern District New York.—Filed Nov. 10, 1905.—John A. Shields, Clerk.

213 National Surety Company.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOHN N. BAGLEY, Plaintiff in Error,
vs.
GENERAL FIRE EXTINGUISHER COMPANY, Defendant in Error.

Bond for Damages and Costs.

Know all men by these presents, That the National Surety Company, having an office and principal place of business at No. 346 Broadway, in the City of New York, County and State of New York, is held and firmly bound unto the above-named General Fire Extinguisher Company in the sum of two hundred and fifty ($250.00) dollars, to be paid to the said General Fire Extinguisher Company, for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal and dated the 16th day of November, in the year of our Lord one thousand nine hundred and five.

Whereas, the above-named John N. Bagley has prosecuted a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above-entitled
214 suit by the Judge of the Circuit Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above-named John N. Bagley shall prosecute writ of error to effect, and answer all damages and costs if he fail to make his plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,
By JOEL RATHBONE, [SEAL.]
Res. Vice-President.

Attest:
RICHARD J. MORIARTY,
Res. Assist. Secretary.

Sealed and delivered and taken and acknowledged this 16th day of November, 1905, before me.

[SEAL.]
A. L. ADAMS,
Notary Public, No. 53, Kings Co.

Certificate filed in New York, Queens and Richmond Counties.

Copy of By-Law.

Be it remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following By-Law was adopted:

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"ARTICLE XIII. SEC. 1. All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the President, the Vice-President, the Second Vice-President, a Resident Vice-President, or an attorney in fact,
215 and, except when signed by an attorney in fact, shall have the seal of the Company affixed thereto, duly attested by the Secretary, Assistant Secretary or a Resident Assistant Secretary. The Vice-President, Second Vice-President and Resident Vice-Presidents shall each have authority to sign such instruments whether the President be absent or incapacitated or not; and the Assistant Secretary and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the Company as if the same were signed by the President, duly sealed and attested by the Secretary."

CITY AND COUNTY OF NEW YORK, *ss:*

I, Richard J. Moriarty, Res. Asst. Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original By-Law.

Given under my hand and the seal of the company at the City of New York, this 26th day of November, 1905.

[SEAL.] RICHARD J. MORIARTY,
Res. Asst. Secretary.

216 CITY AND COUNTY OF NEW YORK, *ss:*

On this 16th day of November, 1905, before me personally appeared Joel Rathbone, Res. Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the City of New York; that he is the Res. Vice-President of the National Surety Company; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; and that he signed said instrument as Res. Vice-President of said Company by like authority; and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 3, Chapter 720 of New York Session Laws of 1893. And the said Joel Rathbone further said that he is acquainted with Richard J. Moriarty and knows him to be the Res. Asst. Secretary of said Company, that the signature of the said Richard J. Moriarty subscribed to the said instrument is in the genuine handwriting of the said Richard J. Moriarty, and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Joel Rathbone, Res. Vice-President.

[SEAL.] A. L. ADAMS,
Notary Public, No. 53, Kings Co.

Certificate filed in New York, Queens and Richmond Counties.

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(Endorsed:) U. S. Circuit Court.—John N. Bagley, Plaintiff in Error, against General Fire Extinguisher Company, defendant in Error.—Bond for Damages and Costs.—Surety: National
217 Surety Company.—Approved as to form and also as to sufficiency of sureties, with reservation, however to the Deft. in Error, of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally.—E. H. Lacombe, U. S. Circuit Judge. —U. S. Circuit Court, Southern District New York.—Filed Nov. 16, 1905.—John A. Shields, Clerk.

By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To General Fire Extinguisher Company, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 12th day of December, 1905, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein John N. Bagley is plaintiff and you are defendant to show cause, if any there be, why the judgment in said suit mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 16th day of November, in the year of our Lord one thousand nine hun-
218 dred five, and of the Independence of these United States the one hundred and thirtieth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—John N. Bagley, Plaintiff in Error, *vs.* General Fire Extinguisher Company, Defendant in Error.—Citation.—Parsons, Closson & McIlvaine, Att'ys for Plaintiff in Error, No. 52 William St. Borough of Manhattan, The City of New York, N. Y.—Service of a copy of the within citation is hereby admitted this 17th of November, 1905. Olney & Comstock, Att'ys for defendant in error.—U. S. Circuit Court, Southern District New York.—Filed Nov. 20, 1905.—John A. Shields, Clerk.

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219 United States Circuit Court of Appeals for the Second Circuit.

No. 63, October Term, 1906.

Argued November 12, 1906; Decided December 4, 1906.

JOHN N. BAGLEY, Plaintiff in Error,
vs.
THE GENERAL FIRE EXTINGUISHING COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Lacombe, and Townsend.

This cause comes here on writ of error from judgment of the United States Circuit Court for the Southern District of New York, entered on finding of Referee, in favor of defendant.

TOWNSEND, *Circuit Judge:*

The material facts herein, as admitted or found by the referee, are as follows:

The plaintiff's assignors, hereinafter called the plaintiff, under the name of the Estate of John J. Bagley, were the owners of certain land and a building thereon in the City of Detroit in the State of Michigan. The defendant was a New York Corporation, engaged in the business of manufacturing and installing automatic sprinklers.

220 In May, 1896, the parties entered into a contract, which was as follows:

"General Fire Extinguisher Company.

"CHICAGO, ILL., *April* 20, 1896.

"Proposal for equipping the property of Estate of J. J. Bagley Building, 19 to 33 Larned St., Detroit, Mich., with an improved System of Fire Extinguisher Apparatus.

"The work under this Proposal consists in furnishing and erecting a System of Wet Pipe Grinnell Automatic Sprinklers, including the necessary piping, &c. * * * Also such other materials and labor as are described and enumerated in the within specifications.

"All the materials to be first-class, and all work herein specified to be done in a thorough and workmanlike manner, and in conformity with the Improved Risks Commission standard for Automatic Sprinkler Installation.

"It is agreed that space for materials, and facilities for the prosecution of the work should be accorded on the premises, * * *. It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party. * * *

"Our price for the work herein specified will be $4,800.00, forty-eight hundred dollars. * * *

"GENERAL FIRE EXTINGUISHER COMPANY,
"By B. W. DAWLEY, *Dept. Ag't.*

"We hereby accept the above proposal and agree to pay the General Fire Extinguisher Company as follows: &c. * * *
"(Signed) ESTATE OF JOHN J. BAGLEY."

(Here followed specifications.)

The defendant equipped said building with such a system, and the referee has found that the materials furnished were first
221 class, and that the work was done in a thorough and workmanlike manner and in conformity with said Risks Commission's standard. The plan, showing sprinkler heads located in the skylights of said building, and designating ordinary heads intended to fuse at 155 degrees Fahrenheit, was shown to said Commission and approved by it, and the system, when installed, was inspected and approved by said Commission, and in consequence thereof the insurance rate was materially reduced.

The sprinkler heads intended to fuse at 155 degrees were proper ones, and if sprinkler heads intended to fuse at 286 degrees had been placed in said skylights, they would not have been approved by said Commission.

The referee further found as follows:

"Fifteenth. That thereafter, and on the fourth day of July, 1897, without the existence of any fire in the said buildings, the sprinkler heads, or certain of them, in the said skylights fused, melted, opened and released the water in certain of the pipes and tanks connected with said sprinkler heads, and furnished and erected by the defendant as a part of said system of automatic sprinklers.

"Sixteenth. That the reason the said sprinkler heads so fused, as aforesaid, was not because there were any defects in the materials used, or in the installation aforesaid, or because the said sprinkler heads fused at a lesser degree of heat than that at which they were intended to fuse, and at which they were marked to fuse, but because of the extraordinary degree of heat in the skylights at the time of said fusing.

"Seventeenth. That at the time of said fusing, the temperature in the said skylights, at the time of the fusing point of said sprinkler heads, reached at least 155 degrees Fahrenheit; that the sprinkler heads which so fused were up to the standards for the sprinkler heads which were marked 155 degrees Fahrenheit, and that the said sprinkler heads did not fuse, as aforesaid, at less than 155 degrees Fahrenheit, the temperature at which they were intended and marked to fuse.

222 "Eighteenth. That the extraordinary temperature in the said skylights at the time of said fusing was caused by the sun's rays shining through the skylights into the space wherein the

said sprinkler heads were located, and by lack of draughts of air in said skylights, and by reason of other and extraordinary physical conditions in and about said skylights; and none of said conditions were caused by the defendant, and all of which were without the fault of the defendant.

"Nineteenth. That because of the fusing of the sprinkler heads aforesaid, and the opening of the same, and the release of the water thereby, considerable water flowed through the said building, and damaged certain stocks of goods and machinery which were therein."

The building at this time was in the possession of certain tenants, and actions were brought by said tenants and their assignees in the courts of the State of Michigan against this plaintiff to recover damages caused by said flow of water.

The plaintiff duly notified this defendant of the commencement of said actions, and requested it to defend the same, but defendant did not defend, and judgments were rendered against this plaintiff in said actions, and the referee found that these judgments did not adjudicate the agreement in question herein, or the acts of defendant under said agreement or the liability of this defendant to this plaintiff.

Upon these facts the referee concluded that, as a matter of law, the defendant was not liable for said damages; that the Michigan judgments were not *res adjudicata* as to the negligence of this defendant in the performance of its contract, and, therefore, were not binding upon it in this action; and that this defendant discharged its whole obligation which it had assumed in its contract, and owed no further duty to the plaintiff and his assignors or the tenants in the building.

It is admitted by counsel for plaintiff that there is no conflict in the evidence upon any material question of fact. The assignments of error challenge the correctness of the conclusion of the referee,

first, that this defendant was not concluded by any fact
223 adjudged in the Michigan suits; second, that the language of the contract "that no obligations other than herein set forth * * * shall be binding upon either party" prohibited any liability of the defendant upon any implied covenant or warranty; and, third, that the defendant discharged its whole obligation which it had assumed under the contract, and owed no further duty to the plaintiff or the tenants in the building because it had installed and delivered under its contract a specifically designated apparatus.

The view which we have taken of the case dispenses us from the necessity of discussing the correctness of this third conclusion. Nor is it necessary to discuss the well settled doctrine, repeatedly discussed and affirmed in this court, that where an article is ordered from a manufacturer for a particular purpose there is an implied warranty that it shall be fit for that purpose. *Cleveland Linseed Oil Co. v. A. P. Buchanan & Sons* (120 *Fed.* 906), and cases cited.

In the case at bar, even if we are bound by the finding of the referee that the work was done in a workmanlike manner and that the materials were first class, a question to be hereafter discussed, and although it is admitted that said work was done in conformity

with the Risks Commission standard, we are not satisfied that the system was so installed as to be suitable for the purpose for which it was ordered, namely, with heads which would fuse and permit the water to flow in case of fire, and would retain the water on all other occasions. And we do not wish to be understood as holding that if this were merely the ordinary contract of a manufacturer to furnish work and materials for a particular purpose, the doctrine of an implied warranty of fitness would not be applicable.

It does not appear that the owners of the building had any knowledge whatever as to the construction or installation of such a system. The work was in charge and under the control of the manufacturers, to be prosecuted according to their judgment, subject only to the approval of the Risks Commission. And it is urged with great force that they might have installed a safe apparatus, suitable for the purpose for which it was ordered, either by providing heads which would fuse at a higher temperature, or by protecting the heads furnished from the rays of the sun in the skylight,
224 or by the adoption of other appropriate measures for guarding against such a disaster.

But we are dealing here with a contract which explicitly provides in terms "that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party." And we are, therefore, constrained to agree with the referee that some substantial effect must be given to this provision, and that such effect operates to relieve defendant from liability.

The natural and reasonable construction of the clause of the contract referred to above is that no warranties should be attached to the contract except those that were "set forth" in terms, and that, therefore, there was no implied warranty or stipulation of fitness on the part of the manufacturer.

We are brought, then, to a consideration of the effect of the Michigan judgment. Here, again, in our opinion, the language of the provision quoted above prevents us from giving to the Michigan judgment the effect which it might otherwise have had. The Michigan judgment was *res adjudicata* between the parties thereto that the owners of the building were bound to exercise ordinary care to furnish their tenants with an apparatus which was suitable and adapted for use in said building, and that such care had not been exercised. We are not called upon to consider under what circumstances this adjudication would have been controlling as to the duty resting upon this defendant towards the owners of the building. It is clear that said judgments were not *res adjudicata* in the case at bar, because, upon the construction which we are forced to give to the limiting clause quoted above, the defendant did not agree to use ordinary care to furnish a suitable system, but agreed only to furnish a certain system, and

"all the materials to be first-class, and all work herein specified to be done in a thorough and workmanlike manner, and in conformity with the Improved Risks Commission standard for Automatic Sprinkler Installation."

225 No such agreement was in issue in the Michigan court, and, therefore, the judgment of said court is not *res adjudicata* in this action.

Certain findings of fact by the referee are challenged, on the ground that the evidence is insufficient to sustain them. The exceptions to said findings, not disposed of by the considerations already suggested, may be summarized under the claim that the evidence fails to show that the work specified was done in a thorough and workmanlike manner.

In support of this contention it is claimed that it was not workmanlike to put 155 degree heads in the skylight without ascertaining the temperature to which they might become heated by exposure to the rays of sunshine alone, and without taking reasonable care to protect the heads against fusing thereunder.

But the evidence showed that in the skylight in the end of the building at Nos. 19 to 21 Larned Street, where one of the heads fused, there were wooden doors for ventilation, operated by swinging sashes, which were ordinarily closed in case of threatened storm and at night, and which were in fact closed at the time of the disaster. The evidence further showed that at the other end of the building at Nos. 31 to 33 Larned Street, where the other head fused, windows were inserted for ventilators.

There is testimony to the effect that in the skylight between said two skylights there were no windows but in view of the evidence as to the windows located in said two skylights this would seem to be immaterial. It is further admitted that at the time of the accident the windows in the skylights where there were any windows, were closed.

In these circumstances we think the referee would have been justified in holding that when the defendant installed the apparatus it had a right to assume that these ventilating windows would be made available for the use for which they were intended at the time when such use was necessary or proper. And in view of the uncontradicted evidence that the installation was in accord with the usual practice in such buildings, and of the finding as to lack of draughts of air, we cannot say, merely because the heads fused, on a hot day when all of said windows were closed, that the work was not
226 done in a workmanlike manner. Furthermore, it appears that, as a part of the apparatus when it was installed, a gong was provided, the purpose of which was to ring the alarm in case of an accident to the sprinkler system, and that the gong sounded at the time of the accident, and that if a watchman had been on the premises at the time when the gong sounded, the flow of water could have been turned off without serious damage.

While it is argued that good workmanship requires some further measures of protection against the rays of the sun, there is no evidence as to the use of any such protectors in said system. And while it is argued that defendant should have used sprinkler heads intended to fuse only at a higher temperature, it appears that if the 286 degree sprinkler heads had been used the Inspector of the Risks Commission would have ordered them out, and that within the last

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few years defendant had made no sprinkler heads to fuse at any point between 155 and 286 degrees.

In these circumstances, inasmuch as it does not appear that the accident would have occurred if the ventilating windows had been open, or that the damage would have resulted if there had been a watchman on the premises, and as it appears that if heads intended to fuse at the higher temperature had been furnished they would not have been approved by the Commission, we think there is sufficient evidence to support the finding of the referee as above.

This case is one of great hardship. The disaster occurred through conditions and under circumstances not actually or naturally within the contemplation of the parties to the contract. Nevertheless, the defendant agreed to install a system which was intended, not only to discharge water in case of fire, but to retain the water under all other circumstances, and the plaintiff, confiding in the reputation and experience of the defendant, entrusted to it the plan and execution of the work. It is, therefore, peculiarly a case in which a warranty of fitness would ordinarily be implied.

But we must not overlook the fact that a warranty if not "one of the essential elements of the contract, * * * but it is a collateral undertaking forming part of the contract by the agreement of the parties, express or implied." *Benjamin on Sales, Section* 610. Here, by agreement of the parties, certain obligations were expressly set forth and warranted, all other obligations, not "herein set forth" were excluded.

227

The judgment is affirmed.

H. B. Closson, for the Plaintiff in Error.
Peter B. Olney, for the Defendant in Error.

228 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 14th day of December one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. William K. Townsend, Circuit Judges.

JOHN N. BAGLEY, Plaintiff in Error,
vs.
GENERAL FIRE EXTINGUISHER COMPANY, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

W. J. W.
E. H. L.
W. K. T.

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It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

229 Endorsed: United States Circuit Court of Appeals, Second Circuit. J. N. Bagley *vs.* Gen'l Fire Ext. Co. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Dec. 17, 1906. William Parkin, Clerk.

230 In the Circuit Court of the United States for the Second Circuit. At Law.

JOHN N. BAGLEY, Plaintiff in Error,
against
GENERAL FIRE EXTINGUISHER COMPANY, Defendant in Error.

Petition for Writ of Error.

And now comes John N. Bagley, the plaintiff, and the plaintiff in error herein, and says:

That on or about the 9th day of January, 1907, this Court entered judgment herein in favor of the defendant and against this plaintiff, affirming the judgment heretofore entered in this case in the Circuit Court of the United States for the Southern District of New York, whereby the complaint of the plaintiff herein was dismissed upon the merits; in which judgment of this Court and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

And this plaintiff further shows to the Court, that this is a case in which the judgment of this Court is not made final by law, and that the matter in controversy therein exceeds One thousand dollars besides costs.

231 Wherefore this plaintiff prays that he may be allowed to prosecute a writ of error to the Supreme Court of the United States under and according to the laws of the United States in this behalf made and provided; and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

Dated, New York, May 9, 1907.

HENRY B. CLOSSON,
Attorney for Plaintiff in Error, 52 William Street, Borough of Manhattan, the City of New York, N. Y.

232 (Endorsed:) In the Circuit Court of the United States for the Second Circuit. John N. Bagley, against General Fire Extinguisher Co. Petition for Writ of Error. Henry B. Closson, Attorney for Plaintiff in Error, 52 William Street, New York City. The within petition allowed. New York May 9, 1907. E. Henry Lacombe, Circuit Judge, United States Circuit Court of Appeals, Second Circuit. Filed May 10, 1907. William Parkin, Clerk.

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233 In the Circuit Court of the United States for the Second Circuit. At Law.

JOHN N. BAGLEY, Plaintiff in Error,
against
GENERAL FIRE EXTINGUISHER COMPANY, Defendant in Error.

Assignment of Error.

Now comes the plaintiff in error in this action, and in connection with his petition for a writ of error to the Supreme Court of the United States, and says, that in the record and proceedings in the above entitled suit, there is manifest error.

I. In that although the plaintiff in error had duly requested the said Circuit Court to find "that in and by the judgments recovered against the estate of John J. Bagley in the Circuit Court of the County of Wayne, in the State of Michigan, one on the 26th day of February 1900, in favor of the Peerless Manufacturing Company for the sum of Four thousand, six hundred and ninety six and 16/100 dollars ($4,696.16), and one on the 10th day of June, 1901, in favor of The United States Casualty Company for the sum of Eighteen thousand, four hundred and forty-four and 40/100 dollars ($18,444.40) it was adjudged that the defendant did not
234 exercise reasonable care in erecting its sprinkler system to ascertain whether the sprinkler heads erected by it in the skylights in question would by the heat of the sun alone be raised to the temperature at which they were designed to fuse;" and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

II. In that although the plaintiff had duly requested the said Circuit Court to find that "in and by the Michigan judgments it was adjudged that it was the duty of the plaintiff's assignors and of their contractor, the defendant, to exercise reasonable care in erecting its sprinkler system to ascertain whether the sprinkler heads erected by it in the skylights in question would, by the heat of the sun alone, be raised to the temperature at which they were designed to fuse"; and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

III. In that although the plaintiff had duly requested the said Circuit Court to find that "in and by the Michigan judgments it was adjudged that the metal of which the sprinkler heads erected by the defendant in the skylights in question were in part composed,
235 was designed by it to fuse at a temperature which it ought reasonably to have been anticipated would be reached in the skylights without other heat than that of the rays of the sun in summer"; and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

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IV. In that although the plaintiff had duly requested the said Circuit Court to find that "in and by the Michigan judgments it was adjudged that it was negligence on the part of the persons doing the work to place these 155° sprinkler heads in the skylights in question"; and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

V. In that although the plaintiff had duly requested the said Circuit Court to find that "in and by the Michigan judgments it was adjudged that the fusible metal employed by the defendant in the sprinkler heads erected by it in the skylights in question was not first-class or suitable material for the purpose which it was there designed to serve"; and the said Circuit Court had refused so to find and its refusal had been duly *duly* assigned for error in this Court, this Court did not, for said error reverse the said judgment.

236 VI. In that although the plaintiff had duly requested the said Circuit Court to find that "in and by the Michigan judgments it was adjudged that the erection in the skylights in question of a sprinkler system, the water of which was prevented from escaping only by materials which would fuse under the heat of the sun in summer, was not workmanlike work;" and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

VII. In that although the plaintiff had duly requested the said Circuit Court to find that "by virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that the tenants of the plaintiff's assignors were not guilty of any negligence contributing to the loss, for the damage by which they recovered in the Michigan suits;" and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

VIII. In that although the plaintiff had duly requested the said Circuit Court to find that "by virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is

237 in his suit *res adjudicata* by the Michigan judgments that it was negligent workmanship to erect in the skylights in question the 155° sprinkler heads;" and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

IX. In that although the plaintiff had duly requested the said Circuit Court to find that "by virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that it was negligent to use as a material for the sprinkler heads erected in the skylights in question solder, which was designed to fuse and would fuse at the temperature at which it did there fuse on the 4th day of July, 1897;" and the said Circuit Court had refused so to find and its

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refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

X. In that although the plaintiff had duly requested the said Circuit Court to find that "by virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that the sprinkler system of the defendant was erected in a negligent and careless manner, and that such negligence and carelessness in the
238 erection of the defendant's sprinkler system was the proximate cause of the damages to the tenants of the plaintiff's assignors for which the tenants recovered in the Michigan suit;" and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

XI. In that although the plaintiff had duly requested the said Circuit Court to find that "by virtue of the provisions of Section 1 of Article IV of the Constitution of the United States it is in this suit *res adjudicata* by the Michigan judgments that the damages occasioned to the plaintiff's assignors by the negligent manner in which the defendant's sprinkler system was erected include the amount paid by the plaintiff's assignors in satisfaction of the Michigan judgments;" and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

XII. In that although the plaintiff had duly requested the said Circuit Court to find that "the negligence and carelessness with which it was by the Michigan judgments adjudicated that the defendant's system was erected consisted of certain methods which the defendant voluntarily and of its own choice adopted to per-
239 form the obligations of its contract with the plaintiff's assignors, and not in anything which it was obliged by the terms of its contract to do in order to perform such obligations;" and the said Circuit Court had refused so to find and its refusal had been duly assigned for error in this Court, this Court did not, for said error reverse the said judgment.

XIII. In that this Court held that such effect as ought to be given to the clause in the contract between the parties providing "that no obligation other than herein set forth and made a part of this appraisal and acceptance shall be binding upon either party" operated to relieve the defendant from liability to the plaintiff and that the natural and reasonable construction of the clause in question is that no warranties shall be attached to the contract except those that were set forth in terms.

XIV. In that this Court held that there was no implied warranty or stipulation of the fitness of the sprinkler system manufactured and furnished by the defendant to the plaintiff on the part of the defendant.

XV. In that this Court held that the provisions of the contract between the plaintiff and the defendant prevented the Court
240 from giving to the Michigan judgment the effect which it otherwise might have had.

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XVI. In that this Court held that it was not called upon to consider under what circumstances the adjudication of the Michigan judgments would have been controlling as to the duty resting upon this defendant towards the plaintiff.

XVII. In that this Court held that such Michigan judgments were not *res adjudicata* in the case at Bar.

XVIII. In that this Court held that it was workmanlike to put 155° heads in the skylight of the plaintiff's building without ascertaining the temperature to which they might be heated by exposure to the rays of the sunshine alone and without taking reasonable care to protect the heads against fusing thereunder.

XIX. In that this Court held that when the defendant installed its apparatus it had a right to assume that the ventilating windows in the skylights would be made available for the use for which they were intended at the time when such use was necessary or proper.

XX. In that this Court held that the installation made by the defendant was in accordance with the usual practice in such buildings; or that there was any evidence to that effect.

241 XXI. In that this Court held that because the sprinkler head fused on a hot day when all of the said ventilating windows were closed, it did not follow that the work was not done in a workmanlike manner.

XXII. In that this Court held that it was a material circumstance that as a part of the defendant's apparatus a gong was provided which sounded at the time of the accident, and that if a watchman had been on the premises when the gong sounded, the flow of water could have been turned off without serious damage.

XXIII. In that this Court held that there was sufficient evidence, or any evidence to support either of the findings of the Referee to which the plaintiff had excepted and the making of which finding had been assigned for error.

XXIV. In that this Court failed to hold that each of the assignments of error by the plaintiff in this Court was well taken and to reverse the judgment for such error.

XXV. In that this Court affirmed the judgment of the Circuit Court of the United States for the Southern District of New York in this cause.

XXVI. In that this Court did not reverse the judgment of
242 the said Circuit Court and did not remand the cause to that Court for a new trial.

HENRY B. CLOSSON,
Of Counsel for Plaintiff in Error.

243 (Endorsed:) In the Circuit Court of the United States for the Second Circuit. John N. Bagley, against General Fire Extinguisher Company. At Law. Assignments of Error. Henry B. Closson, of Counsel for Plaintiff in Error. United States Circuit Court of Appeals, Second Circuit. Filed May 10, 1907. William Parkin, Clerk.

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244 United States Circuit Court of Appeals for the Second Circuit.

JOHN N. BAGLEY, Plaintiff in Error,
against
GENERAL FIRE EXTINGUISHER COMPANY, Defendant in Error.

Know all men by these presents, That the National Surety Company, having an office and place of business at No. 62 Liberty Street, Borough of Manhattan, City of New York, is held and firmly bound unto the above named General Fire Extinguisher Company in the sum of Two hundred and Fifty ($250.00) Dollars, to be paid to the said General Fire Extinguisher Company, for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal, and dated the 7th day of May, in the year of our Lord one thousand nine hundred and Seven.

Whereas, lately at a session of the Circuit Court of the United States for the Southern District of New York, in a suit pending in said Court between John N. Bagley, Plaintiff and General Fire Extinguisher Company, defendant, a final judgment was rendered against the said defendant, and the said John N. Bagley having appealed from said judgment by writ of error to the United States Circuit Court of Appeals for the Second Circuit and the said Court having affirmed the judgment and the said John N. Bagley being about to apply for permission to appeal by writ of error therefrom to the Supreme Court of the United States.

Now, therefore, the condition of this obligation is such, that if the above named John N. Bagley shall prosecute writ of error
245 to effect, and answer all damages and costs if he fail to make his plea good, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered, and taken and acknowledged this 7th day of May, 1907, before me

NATIONAL SURETY COMPANY,
By JOEL RATHBONE,
4th Vice-President.

[L. S.]

Attest:
JOHN HOLMES,
Resident Ass't Secretary.

246 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK, *County of New York, ss:*

On this 7th day of May one thousand nine hundred and seven before me personally came Joel Rathbone, known to me to be the 4th Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of

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John N. Bagley *vs.* General Fire Extinguisher Company as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the 4th Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of John N. Bagley *vs.* General Fire Extinguisher Company is the corporate seal of said Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as 4th Vice-President of said Company, and that he is acquainted with John Holmes and knows him to be the Res. Ass't Secretary of said Company; and that the signature of said John Holmes subscribed to said Bond is in the genuine handwriting of said John Holmes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of One Million dollars.

That —— —— is our agent to acknowledge service in the Judicial District wherein this Bond is given.

JOEL RATHBONE.
(Deponent's Signatures.)

Sworn to, acknowledged before me, and subscribed in my presence this 7th day of May, 1907.

[L. S.] PHILIP B. INGRAHAM,
(Officer's signature, description and seal.)
Notary Public for the County of N. Y., No. 18.

Certificate filed in Kings, Westchester, Richmond & Queens Counties.

247 Endorsed: United States Circuit Court of Appeals for the Second Circuit. John N. Bagley, Plaintiff in Error, *vs.* General Fire Extinguisher Company, Defendant in Error. Bond for Costs on Appeal. Henry B. Closson, Att'y for Plaintiff in Error, 52 William St., N. Y. Within bond approved. New York, May 9, 1907. E. Henry Lacombe, Circuit Judge, United States Circuit Court of Appeals, Second Circuit. Filed May 10, 1907. William Parkin, Clerk.

248 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Apepals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 247 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in

the case of John N. Bagley, Plaintiff in Error, against General Fire Extinguisher Co., Defendant in Error, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 17th day of May in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the said United States the One Hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

249 United States Circuit Court of Appeals for the Second Circuit.

JOHN N. BAGLEY, Plaintiff in Error,
against
GENERAL FIRE EXTINGUISHER COMPANY, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to General Fire Extinguisher Company and Olney & Comstock, it Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be held at the City of Washington, District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of Appeals for the Second Circuit, wherein John N. Bagley is plaintiff, and the General Fire Extinguisher Company is defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

250 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10 day of May, Nineteen hundred and seven; and of the Independence of the United States the one hundred and thirty-first.

E. H. LACOMBE,
U. S. Circuit Judge.

Service of a copy of the above citation is hereby admitted this 15th day of May, 1907.

OLNEY & COMSTOCK,
Att'ys for Def't in Error.

251 [Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. John N. Bagley, Plaintiff in Error, against General Fire Extinguisher Company, Defendant in Error. Citation. Henry B. Closson, Attorney for Plaintiff in Error, No. 52 William Street, New York City, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed May 17, 1907. William Parkin, Clerk.

252 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Justice of the Circuit Court of Appeals of the United States for the Second Circuit:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court of Appeals before you, or some of you, between John N. Bagley, plaintiff in error and the General Fire Extinguisher Company, defendant in error, a manifest error has happened, to the great damage of the said John N. Bagley, plaintiff in error, as by his complaint appears.

We, being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, that then under your seal, you send the record and procedings as aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the City of Washington on the 9th day of June next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice
253 of the Supreme Court of the United States the tenth day of May in the year of Our Lord One thousand nine hundred and seven.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Allowed by:
E. HENRY LACOMBE,
Circuit Judge.

Service of a copy of the above writ of error is hereby admitted this 15th day of May, 1907.

OLNEY & COMSTOCK,
Att'ys for Def't in Error.

254 [Endorsed:] United States Circuit Court of Appeals. John N. Bagley, Plaintiff in Error, against General Fire Extinguisher Company, Defendant in Error. Writ of error. Henry B. Closson, Att'y for Plaintiff in Error, No. 52 William Street, New York City, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed May 17, 1907. William Parkin, Clerk.

Endorsed on cover: File No. 20,736. U. S. circuit court appeals, 2d circuit. Term No. 96. John N. Bagley, plaintiff in error, *vs.* General Fire Extinguisher Company. Filed May 25th, 1907.

IN THE

Supreme Court of the United States

JOHN N. BAGLEY,
Plaintiff in Error
(Plaintiff below),

AGAINST

THE GENERAL FIRE EXTINGUISHER COMPANY,
Defendant in Error
(Defendant below).

Brief for Plaintiff in Error.

Error to the Circuit Court of Appeals for the Second Circuit to review a judgment affirming a judgment of the Circuit Court for the Southern District of New York, which had dismissed the complaint upon the merits; the Federal question involved being the refusal of the Circuit Court to give full faith and credit to a judgment of the Supreme Court of Michigan.

The action was one at law to recover $21,943.78 with interest as damages suffered both by reason of a breach of contract by the defendant and by its negligence in the performance of the contract. The complaint counted both on contract, and in tort for the negligence; and alleged the recovery of judgments in the Michigan courts, to which the defendants were privies, and by which it had been adjudged that the defendants had been guilty of the negligence which was the proximate cause of the damage in question.

There was no conflict in the evidence upon any material question of fact.

Statement of the Case.

The plaintiff and his assignors (hereinafter for convenience sake referred to as the plaintiffs) are the owners of a large business building known as numbers 19 to 33 Larned street in the City of Detroit, Michigan.

In pursuance of an undertaking with the two tenants of the building "to install in the premises a suitable automatic sprinkler system, so-called, as a protection against fire" (fol. 101), and in order "to obtain increased fire protection, and, as a result thereof, a decrease in insurance premiums to be paid by the owners of the building and their tenants" (fol. 97), the plaintiffs on May 27th, 1896, made a written contract with the defendant for the equipment of their building with such a system. As its name implies, it consists, in general, of rows of water piping beneath the ceilings, to which are attached at intervals so-called "sprinkler heads," made of fusible metal. Their purpose is the double one, of retaining the water except in case of fire, and in case of fire of precipitating it upon the floors below. The defendant and its predecessors had been engaged for twenty years in manufacturing and erecting these sprinkler systems, and it was the largest and best known concern in the business (fols. 28, 54, 60).

The contract, with immaterial omissions, reads as follows:

PROPOSAL FOR EQUIPPING THE PROPERTY OF ESTATE OF J. J. BAGLEY, BUILDING 19 TO 33 LARNED STREET, DETROIT, MICHIGAN, WITH AN APPROVED SYSTEM OF FIRE EXTINGUISHER APPARATUS.

The work under this proposal consists in furnishing and erecting a system of Wet Pipe Grinnell Automatic Sprinklers, including the necessary piping, and starting with the main upright supply pipes, each of which has an indicator gate and

draw-off value; also such other materials and labor as are described and enumerated in the within specifications.

All materials to be first-class and all work herein specified to be done in a thorough and workmanlike manner and in conformity with the Improved Risk's Commisssion standard for Automatic Sprinkler installations.

It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party. * * *

Our price for the work herein specified will be $4,800. Should more or less than 1,382 sprinklers be required, they will be charged or credited at $2.60 each. Any additional work or apparatus which may be required not included in our specification, shall be supplied by you, or if by us, at prices agreed upon. If delay on your part in supplying such additional work or apparatus causes us expense, you are to pay such expense.

GENERAL FIRE EXTINGUISHER COMPANY,
By B. W. DAWLEY,
Dept. Agt.

"We hereby accept the above proposal and agree to pay the General Fire Extinguisher Company as follows:

One-third cash when materials are delivered and work commenced; balance cash in 30 days after the completion of the work herein specified.

(Signed) Estate of JOHN J. BAGLEY."

"The within specifications" referred to in the contract are in fact annexed to it. They call in one part of the building for twelve rows and in another for four rows of fourteen sprinklers each in each of the six stories. Nothing is specified as to where in each story the rows of sprinklers or the sprinklers themselves are to be placed, or as to what temperature the different sprinklers to be used are designed to fuse at.

The specifications then provide that the defendant agrees to furnish certain tanks, valves, cut-offs and steam connections, and pay freight and cartage

on material and travelling expenses of its workmen, and they conclude as follows:

"The estate of J. J. Bagley will furnish supports for pressure and gravity tanks, do all earth, masonry and carpentry work, included housing-in of pressure tanks if same are erected on the roof of building; if pressure tanks are erected on top floor of building, no housing-in will be necessary."

No plans are referred to in the contract or annexed to it. Plans were subsequently prepared by the defendant in its Chicago office, but without consultation with the plaintiffs, who had nothing to do with them, and knew nothing about the proper method or arrangement of sprinkler apparatus but relied wholly upon the reputation of the defendant (fols. 24, 26). It was the defendant's manager himself who gave this testimony (fol. 85):

"During the installation the other contracting party (the plaintiffs) exercised no supervision over the work and had nothing to do with it. The person that was in immediate charge of the work was our foreman.

I had had in my possession the plans and specifications for the work. They were prepared in our office. The Bagley estate had nothing to do with the preparation of the plans."

These plans showed that certain of these sprinkler heads were to be located in the three skylights of the building, but did not show at what temperature they were to be designed to fuse; although to an expert the absence of any such notation would have indicated that it was the intention to use the defendant's ordinary head fusing at 155° (fol. 64).

At some time during the autumn of the year 1896 the defendant completed the installation of its apparatus, and on October 8th, 1896, it was inspected and on October 23d, 1896, approved by the Inspector of the Improved Risks Commission (fols. 28, 59, 60). On November 23d, 1896, the plaintiffs paid the defendant the contract price in full (fol. 29),

and afterward obtained the expected reduction of the insurance rate upon the buildings (fol. 29).

In the roof of that part of the building of which Burnham-Stoepel & Company were the tenants there were two skylights, and in that of which the Peerless Manufacturing Company was the tenant there was one. Each skylight was about twenty feet long and twelve feet wide. Their vertical section was in the shape of an isosceles triangle, both the upper sides and the base being composed of panes of heavy cathedral glass. The interior space was thus completely enclosed in glass except for two openings at each end of the skylight where one pane of glass had been removed, and for a ten-inch ventilating pipe in each skylight (fols. 50, 51, 65). Into each of these skylights the defendant in its installation ran a section of its water pipes, to which it attached two sprinkler heads designed to fuse at a temperature of 155°. It is the testimony of the defendant's manager himself that there should be a margin of safety of from 30° to 40° between the temperature at which any sprinkler head is designed to fuse, and that which is likely to be reached, in the absence of any fire, in the place in which it is set, and that it was the defendant's business to ascertain about what such temperature would be.

"Q. You will admit that in installing this system it is your business to know about what temperature may be reached under ordinary circumstances in a particular place where you are placing sprinkler heads, will you not? A. We naturally would know. We try to" (fol. 88).

No effort was, however, in fact made by the defendant to ascertain the temperature likely to be reached in the skylights described under the heat of a summer's sun (fol. 87). The Referee so states in his opinion (fol. 164):

"Undoubtedly no one thought of the possibility that in any part of the buildings the natural heat

might arise under any condition as high as 155 degrees, or that the sprinkler heads which were installed would melt or fuse under conditions arising from natural causes when there was no fire."

It was the testimony of the defendant's own experts that upon a hot summer's day the temperature outdoors in the sun "probably runs about 135° or thereabouts" (fol. 67), and that in an enclosed structure, like the skylights in question, exposed to a summer's sun, it would not be surprising if it should reach to 160° (fol. 83).

According to the uncontradicted testimony of the Inspector of the United States Weather Bureau in charge of the Detroit office, it is usual in Detroit to "have temperatures ranging around from about 90° to 96° [in the shade] every summer under ordinary circumstances," and "a temperature of 94° was *not* an unusual or extraordinary temperature." "The highest temperature we have had recorded here is 101°" (fol. 47).

The first hot summer's day to which the sprinkler system thus erected by the defendant in the plaintiffs' building was exposed appears to have been July 4th of the following year, 1897. The maximum temperature in the shade, as recorded by the United States Weather Bureau on that day, was 94° (fol. 45). Upon such a day the maximum temperature shown by a bright bulb thermometer in the enclosed skylight in question would be, and in fact was, 146° (fols. 51, 45). In such a place and under such solar heat a dull object like a sprinkler head, which would absorb the rays of the sun, would soon attain a temperature of 160° or even 170°. This is the testimony of the defendant's own experts:

"Judging from experiments, if exposed to the direct rays of a hot summer's sun, where a bright bulb thermometer would show 146° Fahrenheit, the metal parts of the head might reach 100° or even 170°." (Testimony of Professor William Hallock, fol. 81.) * * * "The alloy, which being dull,

and not of the same degree of brilliancy and reflecting power as the mercury in the bulb of the the thermometer, would absorb more of the radiant heat than the bright bulb of the thermometer, and consequently tend to stand higher in temperature than the bulb of the thermometer. *This is a principle recognized in science.*" (*Id.*, fol. 77.) * * * "I should say, if it was a bright sunny day, it (the temperature of the dark alloy) might be anywhere from 15 to 30 or 40 degrees (higher than the temperature of the bright bulb thermometer). That would be the result of my opinion from these experiments and from my general knowledge of the subject." (*Id.*, fol. 79.)

"A temperature of 146 degrees, that would not indicate that the temperature upon the alloy in the sprinkler head was not more than 146 degrees; not with the sun shining in the skylight; it might readily be higher. My reasons for my opinion are because *it is well known* that the temperature upon a dark metal object, under the rays of the sun, may be considerably higher than that of any object below it, as this thermometer bulb was. I can coincide with Professor Hallock in his opinion upon those questions." * * *

"I would not be surprised, in a hot summer sun, that the temperature in a skylight like that would rise to 162." (Testimony of Professor Denton, Defendant's expert, fols. 82, 83.)

And at the defendant's request it has accordingly been found as a fact that upon this 4th day of July, 1897, when the maximum temperature recorded by the Weather Bureau was at 94°, the temperature in these skylights, the defendant's expert testified might have been expected, "reached at least 155° Fahrenheit" (fol. 99, 17th Finding).

This temperature, instead of affording the margin of safety of from 30 to 40 degrees which the defendant's manager had testified should be provided for, was the identical temperature at which the sprinkler heads placed by the defendants in these skylights were designed by it to fuse. Accordingly, at some time during the afternoon of this day, in due fulfillment of their function, one of the sprinkler heads

in the Burnham-Stoepel & Co. skylight and one of those in the Peerless skylight as well, did fuse from solar heat alone, there being no fire in the building at the time (fol. 98). Thereupon the supply of water contained in the pipes and tanks of the system rained down from the skylight of each part of the building upon and through the floors below to the basement. As the day was a Sunday it was some hours before the occurrence was discovered and the flow of water stopped.

Suits were thereupon brought in the State Courts of Michigan against the owners of the building to recover the damages done by the drenching to the goods of the two tenants. The declaration in each suit alleged, in substance, that it was the duty of the owners to exercise ordinary care to ascertain whether or not the temperature to which these sprinkler heads would be exposed under solar heat alone would be so great as to make them fuse, although there should be no fire in the building; that if this ordinary care had been exercised the owners would have ascertained that it would; that this ordinary care was not exercised by them; that in this they had been guilty of negligence; and that no negligence in the matter could be imputed to the tenants (fols. 100–114). In both cases the defendant here, the General Fire Extinguisher Company, was duly notified by the owners of the building of the commencement of the action, and requested to defend it. The suits were defended by the owners to the best of their ability; but in both cases, the verdict of the jury was that the owners were "guilty in manner and form as the said plaintiff in its declaration of this cause complained against it" (fols. 30, 31), and judgment went against them in favor of the tenants, in the one case for $4,696.16 (fol. 100), and in the other for $13,548.95 (fol. 114). Upon appeal both judgments were affirmed by the Supreme Court of the State of Michigan (fols. 31, 32). The opinion rendered by that Court upon the affirmance is not

in the record, but will be found in the official reports of that State and is in part as follows:

PEERLESS MFG. CO. *v.* BAGLEY, 126 Mich., 225:

"It was undoubtedly assumed on the part of the agents of the Extinguisher Company that the temperature in the skylight would not reach that degree (146 degrees), but they made no effort to determine the degree of temperature of the skylight in hot weather. If they relied upon experiences elsewhere, it is not shown by this record. An experienced witness for the defendants (Dawley, their General Manager) testified that they (the sprinkler heads) should be set with a leeway of about 30 degrees, and that he would not locate a 155 degree sprinkler head at a place where he knew the temperature would reach over 135 degrees. *We must, therefore, enter upon a determination of the defendant's liability with the fact established that their contractor, the Extinguisher Company, was guilty of negligence.*

It is also established that the defendants (the owners) had had no experience with or knowledge of the construction of the sprinkler apparatus, that they employed a standard company of long experience and of good reputation, and that the system was one in common use. They had therefore exercised that prudence which the law required in choosing independent contractors, and no negligence is directly attributable to defendants. It was to the interest of the defendants as well as that of the plaintiff to have a proper apparatus supplied. In case of flooding both would be damaged.

* * *

We think that in reason as well as authority, the rule of law is that the plaintiff can hold defendants for the negligence resulting in damage to it, *and that the defendants have their remedy against the Extinguisher Company.*"

In the defense of these two suits the owners of the building had necessarily expended $2,277.94. They also satisfied both judgments at an expense of $5,004.06 and $13,939.72 respectively. They then brought this suit in the United States Circuit Court for the Southern District of New York; the plaintiff and all his assignors being residents of other

States than New York, and the defendant a resident of New York (fol. 5), against the defendant to recover the total of $21,943.78, as damages. Four grounds of liability were alleged in the complaint:

FIRST.—That these damages had been occasioned by the breach of an express warranty by the defendant, that all the materials of the system to be installed by it should be "first-class," and that all the work should be done "in a thorough and workmanlike manner" (fol. 5).

SECOND.—That the defendant was the manufacturer of the system and the sprinkler heads, and knew that their purpose was that the water contained in the pipes should be retained at any temperature to which the heads were placed by the defendant would be subjected by the heat of the sun alone, and should be discharged only when they should be exposed to such higher temperature as would be produced by the breaking out of a fire in the portion of the building where the sprinkler heads should be located; that the plaintiffs knew nothing about the manufacture or installation of automatic sprinklers and relied wholly upon the knowledge and judgment of the defendant; and that from these facts the law implied a warranty by the defendant that the sprinkler heads and system should be located with reasonable care and should be reasonably fit for the use for which they were intended and free from any defects which the plaintiffs, with their absence of knowledge on the subject, could not discover with the exercise of reasonable diligence on inspection (fol. 6); and that it was a breach of this warranty which occasioned the damages.

THIRD.—That the defendants had been guilty of negligence in erecting in these skylights sprinkler heads composed of material which would fuse at a temperature to which the defendant should have

known they were liable to be raised in the sky-lights by the heat of the sun alone (fol. 7).

FOURTH.—That upon the institution of the suits against the plaintiffs by their tenants in Michigan, notice had been duly given to the defendant to defend them, that judgments in favor of the tenants had been recovered, by which the defendant was concluded and by which it was adjudged that the sprinkler heads in question had been negligently and improperly made to fuse at a temperature to which they would be raised by the heat of the sun alone in the place where they were erected, and that these sprinkler heads and the pipes connected with them had been negligently erected in the sky-lights, and that the tenants had been innocent of any negligence; and that in satisfaction of these judgments the plaintiffs had been obliged to pay the $21,943.78 (fols. 9–13).

The defendant pleaded that it had made the contract in question with the plaintiffs; that the plaintiffs had full knowledge "of the quality and character of the work, labor and materials to be used in carrying out the agreement"; that the defendant had performed its contract and its work had been accepted and paid for by the plaintiffs. Otherwise it pleaded a general denial.

By consent of both parties, the issues were tried before a Referee.

Upon the evidence above summarized the Referee was asked by the plaintiffs to find that by the Michigan judgments it had been adjudged that

(*a*) It was the duty of the defendant to exercise, and that it had not exercised, reasonable care to ascertain whether its sprinkler heads if put in the sky-lights would be melted by the heat of the sun;

(*b*) These heads were designed by the defendant to fuse at a temperature which it ought to

have known would be reached in the sky-light under a summer's sun;

(*c*) It was negligence on the part of the persons doing the work to erect these sprinkler heads in the sky-lights;

(*d*) The metal of which these heads were composed was not first-class or suitable material for the purpose it was designed to serve.

(*e*) The erection in the sky-lights of piping, the water in which was prevented from escaping only by materials which would melt under the heat of the sunshine there, was not workmanlike work (*fols. 152–153*).

The Referee was also asked by the plaintiffs to find as conclusions of law that by virtue of Section 1 of Article IV of the Constitution of the United States it was in this suit *res adjudicata* by the Michigan judgments that

(*a*) The plaintiffs' tenants had not been guilty of any contributory negligence;

(*b*) It was negligent workmanship to put these sprinkler heads in these sky-lights;

(*c*) It was negligent to use as a material for the heads solder which the heat of the sun alone would and did melt;

(*d*) The defendant's sprinkler system was erected in a negligent manner, and such negligence of the defendant was the proximate cause of the damages recovered from the plaintiffs by their tenants in the Michigan suits (*fol. 157*).

All these requests, in fact all requests submitted by the plaintiffs, were refused by the Referee (*fols. 136–159*); and judgment was ordered by him dis-

missing the complaint upon the merits (*fol. 118*). From the judgment entered upon his report, on exceptions and assignments of error (*fols. 120–135; 168–212*) undoubtedly sufficient to present every question in the case, the plaintiffs appealed to the Circuit Court of Appeals.

In that Court, although the judgment was affirmed, it seems to have narrowly escaped a reversal. The Court of Appeals appear to have differed from the Referee, and to have upheld the contention of the plaintiffs, upon every question of law in the case, with but one exception. It was only by reason of the construction they put upon one clause in the contract that they felt constrained to refuse to enforce against the defendant the Michigan judgments and to affirm the decision of the Referee. They said:

"We are not satisfied that the [defendant's] system was so installed as to be suitable for the purpose for which it was ordered, namely, with heads which would fuse and permit the water to flow in case of fire, and would retain the water on all other occasions. And we do not wish to be understood as holding that if this were merely the ordinary contract of a manufacturer to furnish work and materials for a particular purpose, the doctrine of an implied warranty of fitness would not be applicable. It does not appear that the owners of the building had any knowledge whatever as to the construction or installation of such a system. The work was in charge and under the control of the manufacturers, to be prosecuted according to their judgment, subject only to the approval of the Risks Commission. And it is urged with great force that they might have installed a safe apparatus suitable for the purpose for which it was ordered, either by providing heads which would fuse at a higher temperature, or by protecting the heads furnished from the rays of the sun in the skylight, or by the adoption of other appropriate measures for guarding against such a disaster (*fol. 223*). * * * The defendant agreed to instal a system which was intended, not only to discharge water in case of fire, but to retain the water under all other circumstances; and the plaintiff, confiding in the reputation and experience of the defendant, entrusted to

it the plan and execution of the work. It is therefore peculiarly a case in which a warranty of fitness would ordinarily be implied (*fol. 226*). * * *

"But we are dealing here with a contract which explicitly provides in terms 'that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party.' *And we are therefore constrained to agree with the Referee that some substantial effect must be given to this provision, and that such effect operates to relieve defendant from liability.*

"The natural and reasonable construction of the clause of the contract referred to above is that no warranties should be attached to the contract except those that were 'set forth' in terms, and that therefore there was no implied warranty or stipulation of fitness on the part of the manufacturer.

"We are brought, then, to a consideration of the effect of the Michigan judgment. *Here again, in our opinion, the language of the provision quoted above prevents us from giving to the Michigan judgment* the *effect which it might otherwise have had* * * * It is clear that said judgments were not *res adjudicata* in the case at bar, because, *upon the construction which we are forced to give to the limiting clause quoted above, the defendant did not agree to use ordinary care to furnish a suitable system*, but agreed only to furnish a certain system, and 'all the materials to be first class, and all work herein specified to be done in a thorough and workmanlike manner, and in conformity with the Improved Risks Commission Standard for Automatic Sprinkler Installation'" (*fol. 224*).

From the judgment of affirmance entered upon this opinion in the Circuit Court of Appeals, the plaintiff sued out a writ of error to this Court, and assigns for error, among other things, the ruling of the Court of Appeals refusing to give full faith and credit to the Michigan judgments (*fols. 233-240*).

As substantially all of these assignments of error (pp. 125-128), as well as those of the Circuit Court of Appeals (pp. 93-114), are relied upon, it is not supposed that the spirit of Rule 21 requires us to overload this brief by repeating them at length.

Those which are not necessarily involved in the discussion of the questions already outlined and are yet considered of special importance, will be referred to hereafter in connection with the points to which they relate.

FIRST POINT.

If it be true that the law has said its last word upon the rights of the three parties concerned in this case,—the tenants who suffered the damage, the landlords who have been required to pay it, and the contractor whose negligence caused it,—then the law is powerless to remedy both a serious miscarriage of justice and a lamentable conflict between the two courts of Michigan and of New York in rendering judgment upon the same questions between the same parties.

The tenants without any negligence on their part have had over $16,000 of damage done to their goods by the melting of the defendant's sprinkler system under the heat of a summer's sun. All that the landlords, knowing nothing of sprinkler systems, have done, is to order the best known manufacturers of such systems in the country to erect one of first-class materials, in a workmanlike manner, leaving all of the details of the construction to them. The sole cause of the damage to the tenants' goods was the negligent way in which this Extinguisher Company did its work. Yet the landlords have been required to pay the tenants' damages and the Extinguisher Company has gone scot free.

Upon these facts the law laid down by the Michigan Court is as follows:

"*We must, therefore, enter upon a determination of the defendants' (landlords) liability with the fact established, that their contractor, the Extinguisher Company, was guilty of negligence.* It is also established that the defendants had had no experience with or knowledge of the construction of the sprinkler apparatus, that they employed a standard company of long experience and of good reputation, and that the system was one in common use. They had therefore exercised that prudence which the law required in choosing independent contractors, and no negligence is directly attributable to defendants." * * *

We think that in reason as well as authority the rule of law is that the plaintiff can hold defendants for the negligence [of the contractors] resulting in damage to it, *and that the defendants have their remedy against the Extinguisher Company.*" Peerless Co. *vs.* Bagley, 126 Mich., 225.

On the other hand, the Circuit Court of the United States for the Southern District of New York, whose judgment has been affirmed below, declares the law to be as follows (fol. 165):

"The estate [the landlord] might very well be presumed to know what the conditions of temperature in the buildings were; and if it did not know them it was bound to exercise reasonable care to ascertain them. If it negligently installed a system which was not suitable to the building—one which under conditions that were likely to exist would permit the discharge of large quantities of water when there was no fire—it was undoubtedly liable for the damages caused by its own neglect in that respect, and it could not escape liability because it had made a contract with a reputable concern to install the system. * * *

"*The judgments entered against the plaintiff and his assignors in the courts of Michigan did not determine in any respect that the defendant was negligent in the performance of its contract*, and are not, therefore, binding upon it in this action.

"There must be judgment in favor of the defendant [the contractor] dismissing the complaint upon the merits" (fol. 167).

SECOND POINT.

This Court has jurisdiction of the appeal.

1. The contention of the plaintiff is, and has been from the beginning, that by a right accorded to him by the Constitution of the United States he is entitled in this action to have given to the Michigan judgments the faith and credit which they have by law and usage in the courts of the State of Michigan; and by virtue thereof, to judgment against the defendant for the relief demanded.

Necessarily, therefore, the case is one which involves the construction and application of the Constitution of the United States.

BROWN *v.* FLETCHER'S ESTATE, 210 U. S., 82:

By the Court: "The federal question presented is, whether the Michigan Courts gave force and effect to the first section of Article IV of the Federal Constitution, which provides that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.' That this is a federal question is not open to doubt. (*Huntington* v. *Attrill*, 146 U. S., 657, 666, and cases cited)".

FAUNTLEROY *v.* LUM, 210 U. S., 230:

By the Court: "The doctrine laid down by Chief Justice Marshall was 'that the judgment of the State Court should have the same credit, validity and effect in every other Court in the United States which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other Court of the United States.' * * * We assume that the statement of Chief Justice Marshall is correct. It is confirmed by the Act of May 26, 1790 (Revised Statutes, Section 905), providing that the said records and judicial proceedings 'shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the

State from whence the said records are or shall be taken.' "

In both the above cases, being writs of error to State Courts, the exact point decided was that the claim of full faith and credit for the judgment of a sister State was a "right," "claimed under the Constitution." But every case in which a right is claimed under the Constitution must be likewise a case "involving the construction and application of the Constitution of the United States."

Merritt v. *American Steel Barge Co.* (75 Fed. Rep., 813; Circ. Ct. of App., 8th Circuit):

The plaintiffs had sued the defendants in the United States Circuit Court for the District of Minnesota, for damages for the conversion of certain stock. The defendants pleaded in bar a judgment of the Supreme Court of New York in an action by the defendants to foreclose their lien upon the stock, alleging that the stock had been within the jurisdiction of the Supreme Court, and that notice had been given to the plaintiffs of the pendency of the suit. The Circuit Court held the judgment to be a bar to the action. Thereupon the plaintiffs took a writ of error to the Circuit Court of Appeals, which the defendants moved to dismiss, upon the ground—

"that inasmuch as the sole question to be determined on the present appeal was whether the Circuit Court gave such force and effect to the judgment of the Supreme Court of New York as it was its duty to give, the controversy is one which involves the construction and application of Section 1 of the Federal Constitution,"

and that therefore the appeal must be taken direct to the Supreme Court. The Circuit Court of Appeals denied the motion to dismiss upon the ground that as Congress had passed the Acts of May 26, 1790, and March 27, 1804, giving effect to the provision of the Constitution, the case presented also a ques-

tion of the proper interpretation of an act of Congress, and that therefore the Circuit Court of Appeals had jurisdiction to hear the appeal.

2. Although a case be one of those defined in Section 6 of the Act of March 3, 1891, in which the judgment of the Circuit Court of Appeals is declared to be final, yet if it "belong also to the class mentioned in the 5th section of the act," because it is likewise a case "that involves the construction or application of the Constitution of the United States," then the judgment of the Circuit Court of Appeals is not final; and an appeal lies to this Court from its judgment as it would have lain directly from the Circuit Court.

SPRECKELS SUGAR REFINING CO. *v.* MCCLAIN, 192 U. S., 397, 408:

By the Court: "The meaning of the words 'arising under the revenue laws' in the sixth section is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the fifth section of that act [*i. e.*, 'any case that involves the construction or application of the Constitution of the United States']. We do not think that the words quoted necessarily embrace a case carried to the Circuit Court of Appeals, which, although arising under the revenue laws, and involving a construction of those laws, depends for a full determination of the rights of the parties upon the construction or application of the Constitution, or upon the constitutionality of an act of Congress. We lean to that interpretation of the act which enables the defeated party in such a case in the Circuit Court of Appeals to have, as of right, upon writ of error to that Court, a re-examination here of the judgment (the requisite amount being involved) if the correctness of the judgment depends in whole or in part upon the application or construction of the Constitution. * * *"

3. A case of diverse citizenship, like one arising under the revenue laws, is one in which the judg-

ment of the Circuit Court of Appeals is declared to be final; and it too "belongs also to the class mentioned in the 5th section of the act," if it be a case that also involves the construction or application of the Constitution of the United States, and this though the constitutional question "came from the defendant or arose after the filing of the petition or during the progress of the suit."

Loeb v. *Columbia Township Trustees*, 179 U. S., 472:

This was an appeal directly to the Supreme Court from the judgment of the Circuit Court sustaining a demurrer to a complaint. The complaint showed that the parties were citizens of different States, and stated no other grounds of Federal jurisdiction. The record showed, however, that the defendant by demurrer had raised, and the Court below decided a question whether an act of the State Legislature contravened the provisions of the United States Constitution.

By the Court: "When the question is whether a judgment of the Circuit Court of Appeals is final in a particular case, it may well be that the jurisdiction of the Circuit Court is, within the meaning of that section, to be regarded as depending entirely upon the diverse citizenship of the parties, if the plaintiff invoked the authority of that court only upon that ground; because in such case the jurisdiction of the Court needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this Court to review the final judgment of the Circuit Court is prescribed by the 5th section. *Our* jurisdiction depends only on the inquiry whether that judgment was in a case in which it was claimed that a State law was repugnant to the Constitution of the United States."

The judgment of the Circuit Court of Appeals is as plainly made final in a mere internal revenue case as in a mere diverse citizenship case. This statute does not distinguish between them.

"The judgment or decree of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite

parties being * * * citizens of different states; also, in all cases arising * * * under the revenue laws."

Yet in either one of these classes of cases, if when the appeal from the Circuit Court is taken the case is also "a case that involves the construction or application of the Constitution of the United States," an appeal lies of right either to this Court (Loeb *v.* Columbia Township Trustees, 179 U. S., 472), or to the Circuit Court of Appeals, and in either Court brings up "all the questions arising upon the record" (Spreckels S. R. Co. *v.* McClain, 192 U. S., 397, 407).

4. If the appeal be taken to the Circuit Court of Appeals, and that Court entertain no doubt about the other questions than the constitutional one, it may certify to this Court the constitutional question only; and this Court, if it takes the same view of the other questions, reviews the constitutional question only, and can never be troubled with the consideration of the other questions. But if the Circuit Court of Appeals consider the other questions equally worthy of review by this Court, it will doubtless refrain from certifying the constitutional question alone.

Is it a reasonable construction of the Act that would give the defeated party a review by this Court of the constitutional question in a case where the other questions are simple, or non-existent, and deny it where they are present and difficult? If not, it must have been the intention of Congress to allow an appeal from the Circuit Court of Appeals to this Court as of right, if a constitutional question is presented, even in cases where the judgment of the Circuit Court would otherwise be final. And so this Court has held (*Spreckels* Case, *supra*). Does not the same reasoning require the rejection as altogether unreasonable of a construction of the act which would give to a defendant this right of appeal

to this Court in such a case upon a constitutional question if presented by the plaintiff in his complaint, and deny the right if the question be raised by a ruling against the defendant upon the trial, and yet give it to either party if the appeal be taken directly to this Court from the Circuit Court? The only object to be gained by such an apparently unreasonable construction would be to discourage, instead of encouraging, an appeal to the Circuit Court of Appeals in the first place and the possible termination of the case there, to the *pro tanto* relief of this Court.

5. It would seem that no such construction should be given to the law unless unavoidable; and also that far from being unavoidable it can be attained only by attaching in one class of cases a limitation neither implied nor expressed to a phrase in no way obscure; while yet in another class of cases allowing it its obvious meaning. The only reason why the same case could be considered, when the subject of a direct appeal to this Court from the Circuit Court, one involving the construction of the Constitution, and one not involving the construction of the Constitution when appealed from the Circuit Court of Appeals, is because the decision of that Court is declared to be final in a case in which the jurisdiction depends only upon diverse citizenship. But the whole point of the decision in the Spreckels case is that to each of these definitions of the "final" cases is to be added the words "unless a question under the Constitution be likewise involved." If such a question be involved it is immaterial, for the purpose of regulating the appellate jurisdiction of this Court, whether it be involved in such a way as to give the Circuit Court original jurisdiction, or whether it arise after that Court has already obtained jurisdiction. The purpose of the act is to make the Circuit Court of Appeals decision final, when the questions presented are only those non-constitutional ques-

tions which arise in diverse citizenship cases, internal revenue cases, etc.; not to withhold it in any of these cases when there is presented in it, in whatever way, the constitutional question which it is the peculiar office of this Court to resolve. Were the rule to be otherwise its effect, as soon as understood, could only be in all cases like the present to prevent any appeal to the Circuit Court of Appeals and a possible ending of the case there, and to substitute instead an invariable appeal upon the whole case direct to this Court.

6. But in the case at bar the jurisdiction of the Circuit Court did not depend entirely upon the diverse citizenship of the parties.

(a) It appeared at the outset from the complaint of the plaintiffs that the whole basis of the right which the plaintiff asserted against the defendant was the force and effect given by the Constitution of the United States and the Act of Congress, passed pursuant to it (U. S. R. S., Sect. 905), to an adjudication by the Michigan courts, in an action by the result of which the defendant was bound, of the facts upon which the defendant's liability depended.

The complaint alleged not only the facts before the Michigan courts, but that

"the defendant was duly notified of the commencement of the said action and was requested to defend the same";

and that by the judgment therein

"it was adjudged that one of the sprinkler heads above referred to * * * had been negligently and improperly made of such material as to fuse at too low a degree of temperature * * * and that such sprinkler and the pipes connected with it had been negligently and improperly erected and located in the cupola aforesaid"; that the plaintiffs' tenant "had been wholly without negligence in the premises"; and that "by reason of the negligent acts aforesaid in regard to the composition, erection and location of the said sprinkler head and the piping

connected with it the tenants' goods had been damaged" (*fols. 9, 10, 12 and 13*).

By reason of these facts the plaintiffs asserted their right under the Constitution and laws of the United States to have the same judgment passed against the defendant in this suit in the Circuit Court of the United States for the Southern District of New York. It is true that the plaintiffs did not in so many words plead the existence of the provisions of the Constitution and laws of the United States which gave them this right; but they had the opinion of this Court that it was altogether unnecessary for them to do so.

BRIDGE PROPRIETORS *v.* HOBOKEN CO., 1 Wall., 116:

By the Court: "It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States on which he relies for the action of the Court in the protection of his rights. If the courts of this country, and especially this Court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and the defendant in their pleadings make a case which necessarily comes within some of the provisions of that instrument, this Court surely can recognize the fact without requiring the pleader to say in words, 'This paragraph of the Constitution is the one involved in this case.'"

(*b*) The distinction between this case and such cases as *Provident Savings Society* v. *Ford*, 114 U. S., 635, and *Pope* v. *Louisville, etc., Railway*, 173 U. S., 573, is sufficiently obvious. Those were both actions brought directly upon a judgment recovered in another State by the plaintiff against the defendant; and it was of such a suit that this Court said in the earlier case:

"What is a judgment, but a security of record showing a debt due from one person to another? * * * It is simply the case of an ordinary right

of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified) distinctly involving the laws of the United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised then it is conceded it would be a case arising under the laws of the United States.

"These considerations show a wide distinction, as it seems to us, between the case of a suit merely on a judgment of a United States court, and that of a suit by or against a United States corporation; which latter, according to the masterly analysis of Chief Justice Marshall in Osborn *v.* Bank of the United States, 9 Wheat., 738, is pervaded from its origin to its close by United States law and United States authority."

The analysis of Chief Justice Marshall referred to was in part as follows:

"The question respecting the right [of a United States corporation] to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not in the defense, it is still a part of the cause and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The question which the case involved then must determine its character, whether those questions be made in the cause or not. The appellants say that the case arises on a contract; but the validity of the contract depends on the law of the United States, and the plaintiff is compelled in every case to show its validity. The case arises emphatically under the law; the act of Congress is its foundation. The contract could never have been made but under the authority of that act. The act itself is the first ingredient in the case—is its origin—is that from which every other part arises."

It is equally true of the case at bar, that the question of the plaintiffs' right under the Constitution and laws of the United States to have this defendant adjudged in the Southern District of New York, to be concluded by the adjudication of the facts made in the Michigan judgment, "forms an original ingredient" in the cause; that the validity of the right sued on "depends on a law of the United States," and that "the case arises emphatically under the law;" "the act of Congress is its foundation."

COOKE *v.* AVERY, 147 U. S., 375, 384, 390:

The plaintiff, suing in trespass, relied for his title upon the effect as a lien of a judgment of the Circuit Court of the United States in another action.

By the Court, Mr. Chief Justice FULLER: "Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States. * * * Plaintiff is to be regarded as the purchaser at the sale, and the validity of his purchase turned upon the existence of a lien which he asserted and the defendants denied. The disposition of this issue depended upon the laws of the United States and the rules of the Circuit Court, and their construction and application were directly involved. We are of opinion that jurisdiction as resting on the subject matter was properly invoked."

THIRD POINT.

The Constitution and laws of the United States secure to the plaintiff the right to have the defendant concluded in the Circuit Court of the United States for the Southern District of New York upon the facts adjudicated in the Michigan suits, to the same extent as he would have been held concluded had the action been brought instead in the State courts of Michigan. The extent to which the plaintiff would have been held in the State of Michigan concluded by the former Michigan judgments is a question of the law of Michigan. That the law of Michigan upon this subject was not proven as a fact before the Circuit Court is immaterial, since the Circuit Court, and this Court upon appeal from it, takes judicial notice of that law.

FOURTH NATL. BANK *v.* FRANCKLYN, 120 U. S., 747:

By the Court: "In the Court below (U. S. Circuit Court for the Southern District of New York) statutes and decisions of Rhode Island were agreed or proved and found as facts, in seeming forgetfulness of the settled rule that the Circuit Court of the United States, as well as this court, on appeal or error from that court, takes judicial notice of the laws of every State of the Union."

See, also, Hanley *v.* Donoghue, 116 U. S., 1, 6.

The result would be no different if the Circuit Court of the United States for the Southern District of New York were to follow the rule in such cases

of the State courts of New York. The State courts, in the absence of proof on the subject, would have presumed that the rules of the common law on the subject, as they have been laid down both by the New York courts and by this Court, in cases hereafter referred to, prevail in Michigan.

FRANZEN *v.* ZIMMER, 90 Hun, 103:

By the Court: "We have a right to assume, in the absence of proof to the contrary, that the common law prevails in the State of Minnesota. It has been held that where a party relies upon the fact that some general rule of common law is in force in another State, he need not give any proof of that fact; for the reason that the Court will presume the law of a sister State to be the same as its own law, and to be in its main outlines common law (Holmes *v.* Broughton, 10 Wend., 75; Savage *v.* O'Neill, 44 N. Y., 298)."

FOURTH POINT.

Every question upon which the right of the plaintiffs to a recovery against the defendant depends, would have been held, in the Michigan courts, to have been conclusively determined against it by the former judgments of the Michigan courts rendered in the suits of which it was notified, and which it was asked to defend.

The material facts which were thus adjudicated by the Michigan judgments are the following:

1. The plaintiffs' tenants were guilty of no negligence contributing to the injury to their goods.

2. If ordinary care had been exercised in the erection of the defendant's sprinkler system, the injury to the goods of the plaintiffs' tenants would have been prevented.

3. This ordinary care in the erection of the defendant's system was not exercised.

4. It was the negligence of the defendant, the Extinguisher Company, in erecting these particular sprinkler heads in the skylights of the plaintiffs' building, without taking any care to ascertain the heat to which they would be there subjected under the rays of the sun if not protected from it, or any care to protect them from it, which was the proximate cause of the damage to the goods of the plaintiffs' tenants.

To ascertain that these facts were adjudicated by the Michigan judgments it is only necessary to examine the grounds of liability alleged by the plaintiffs in the Michigan suit, the verdict of the jury, the judgment entered upon it, and the reasons assigned by the Supreme Court of Michigan for affirming the judgment.

It will thence be seen that it is an error into which both of the Courts below have apparently fallen, to consider that the landlords were held liable in the Michigan suits to their tenants because they had undertaken "to furnish their tenants with an apparatus which was suitable and adapted for use in said building," and had not done so. On the contrary, although in the Michigan complaints there was a count upon such contract liability, the complaint was also based upon negligence pure and simple.

"It was the duty of the defendants, their agents, and servants, to plaintiff, to have used due care to install a system of such character and so adjusted and arranged in all its parts as not to discharge water therefrom except when designed, to wit, when

a fire occurred; and it was their duty in erecting the sprinkler heads through the building to locate them in such places and to make them of such materials and manufacture that they would not fuse at a temperature created by the falling of the sun's rays on same, or from the heat of a summer's day, but only at a much higher temperature; but defendants did not exercise such care, but on the contrary plaintiff avers that defendants negligently placed one of such sprinkler heads in and near a certain close, hot and stuffy cupola in the topmost story in said premises and near the glass sides thereof, and in a location where the rays of the sun would readily fall on the same; * * * and they so negligently constructed such system in and near such cupola and so placed the sprinkler head in the same and negligently made the fuse of such composition as to melt at such a low degree of temperature that afterwards, to wit, on July 4, 1897, said sprinkler head fuse of said system was melted by the heat of the day and by the sun's rays falling on the same through the window in such cupola as aforesaid; * * * and defendants well knew, or by exercising reasonable diligence and care would have known, that said sprinkler head fastening in said cupola was liable to fuse on any hot day in summer and let the water flood the premises and do great damage to plaintiff's stock and machinery; nevertheless the defendants did negligently, carelessly and recklessly locate said sprinkler head, the fastening of which was designed to fuse at so low a temperature, in said hot, close and stuffy cupola. And it was because of such negligence on the part of the defendants that the fuse of said sprinkler head melted as aforesaid and the water was discharged through the building" (*fols. 106–107*).

Upon these allegations the verdict of the jury was:

"That the said defendants are guilty in manner and form as the said plaintiff hath in its declaration in this cause complained against them" (*fols. 30–32*.

The judgment entered upon these verdicts was:

"That the said plaintiff do recover against the said defendants its damages assessed as aforesaid."

And the Supreme Court of the State of Michigan in affirming this judgment held as follows:

"We must, therefore, enter upon a determination of the defendants' liability with the fact established that their contractor, the Extinguisher Company, was guilty of negligence. It is also established that the defendants had had no experience with or knowledge of the construction of the sprinkler apparatus, that they employed a standard Company of long experience and of good reputation, and that the system was one in common use. They had, therefore, exercised that prudence which the law required in choosing independent contractors, and no negligence is directly attributable to defendants. * * * We think that in reason as well as authority, the rule of law is that the plaintiff can hold defendants for the negligence resulting in damage to it, and that the defendants have their remedy against the Extinguisher Company" (*Peerless Mfg. Co.* v. *Bagley*, 126 Mich., 225).

FIFTH POINT.

Unless there can be found in the contract which the Extinguisher Company made with the plaintiffs some provision exempting it from the consequences of its own negligence, every fact necessary to establish the liability of the Extinguisher Company to the plaintiffs must, not only under the law of Michigan, but of every State where the common law prevails, be held to have been con-

clusively established by the judgment entered in the Michigan suits of which the defendant was notified and which it was asked to defend.

The opinion of this Court in the leading case on the subject (*Washington Gas Co.* v. *District of Columbia*, 161 U. S., 316) covers in two sentences the whole situation:

"The judgment against the District [the landlords] conclusively established a fact from which, as the duty to repair [to erect with due care] rested on the Gas Company [the Extinguisher Company], its negligence results. The proposition that the judgment, although conclusive, does not determine the negligence of the Gas Company, is a mere sophistry, since, on the one hand, it admits the estoppel resulting from the judgment, and on the other, denies a fact upon which the judgment depends, and without which it could not exist."

The same rule of law has repeatedly been laid down by the New York Court of Appeals.

Prescott *v.* LeConte, 83 App. Div., 482; affirmed 178 N. Y., 585:

By the Court: "The plaintiffs' liability has been predicated not upon the covenant in the lease, but on account of failure to perform the duty of protecting their tenants' goods from damage by the elements, while making repairs which they had undertaken and delegated to these defendants who in turn assumed the obligation and proceeded with the work. The plaintiffs were not personally negligent; but as to their tenant having delegated the duty which they owed of making these repairs, they were held responsible for the manner in which the work was done. It seems to us clear that the defendants are liable over to the plaintiffs. * * *

"If the defendants are liable over to the plaintiffs for the damages which the plaintiffs have necessarily sustained in consequence of the acts of the defendants concerning these repairs, it would seem that the defendants should be concluded by

the judgment against the plaintiffs recovered in an action of which the defendants had notice and an opportunity to defend. If this be not so, the question of the amount of damages and of the negligence of Blumenthal & Co. (the tenants) is still open to litigation and there is no certainty that the determination of these questions in this action will be the same as in the former suit. * * *

"The theory of the rule that a party who is liable over and has notice and an opportunity to defend an action is bound by the judgment, is not limited to cases of direct liability or suretyship, or those where the liability is predicated upon the same contract or duty. The rule is based upon sound public policy in order that different judicial decisions may not be made on the same state of facts and to prevent the same questions being litigated over and over in different suits; and it applies where any privity exists between the parties by which one is liable over to another. It is not essential that the party who is ultimately liable shall be liable on the same contract, or could have been held liable in the former action, or that he shall be directly a party to the transaction by which the person to whom he is liable over becomes obligated; it is sufficient that between him and the party sued the duty for a violation of which the action is brought rests primarily upon him and that the material facts have been litigated in the former action of which he had notice and an opportunity to defend."

Carleton *v.* Lombard Ayres & Co., 149 N. Y., 137:

The defendant had sold the plaintiffs a quantity of oil with a warranty of quality. The plaintiff had then re-sold it to some Calcutta merchants who subsequently had brought suit against the plaintiff for breach of a warranty that the oil should be merchantable and recovered. The plaintiffs paid the judgment and then brought suit against the defendant upon an implied warranty claimed to have been attached by law to the written contract, that the oil was free from hidden defects rendering it unmerchantable which could have been avoided by the manufacturer by the exercise of reasonable care. It was held that the defendant having been notified to defend the former suit was concluded by it as to the fact adjudged by it, viz.: 'that the oil when

delivered alongside the *Corby* (the vessel on which the oil was shipped from New York to Calcutta) was unmerchantable, since that was the ground upon which the parties in Calcutta recovered damages as we must assume from the present condition of the record.'

Mayor *v.* Brady, 151 N. Y., 611:

By the Court: "The judgment roll in the action brought by Cruikshank against the City was conclusive evidence against the defendant therein, and also against these defendants and the contractors, since they had notice of the pendency of this suit, and an opportunity to defend it, of the amount of the damages, the existence of the defect or obstruction in the street, and that the injured party was himself free from negligence. These propositions have often been decided in actions of this character where a liability over is sought to be established and many of the cases have recently been reviewed and re-affirmed in this court (citing them). The complaint in that action charged the City with negligence in permitting the obstruction on the sidewalk which had been placed there by the contractors to remain and the plaintiff gave proof *dehors* the record that the negligent act for which the City was sued, and upon which the verdict passed, was that of the contractors and not that of the City. When the proofs closed there was no evidence upon which a verdict could be rendered that the City itself, and not the contractors, was the party primarily liable for the injury. The case against the sureties was made out by the judgment record in the former action and the undisputed proof that the issue tried and submitted to the jury in that case was based solely on the act of the contractors in obstructing the sidewalk in the progress of the work."

It is this rule of the common law as laid down by this Court and the New York Court of Appeals in in the cases cited which prevails in the State of Michigan.

PEERLESS MANUFACTURING CO. *v.* BAGLEY, 126 Mich., 225:

By the Court: "We think that in reason as well as authority, the rule of law is that the plaintiff can

hold defendants for the negligence resulting in damage to it, and that the defendants have their remedy against the Extinguisher Company."

KNICKERBOCKER *v.* WILCOX, 83 Mich., 200:

The defendant had asked the plaintiff to go on the bond of a defendant in a replevin suit, promising that "if you will sign said bond we will stand between you and all harm." The attorney for the defendant in the replevin suit recovered a judgment against the plaintiff for counsel fees in an action which the defendant was duly notified to defend.

By the Court: "Of the suit brought by Mr. Van Fleet against Mr. Knickerbocker for counsel fees, Mr. Wilcox had due notice, and was asked to defend. Having declined to do so we think he is bound by the judgment, unless it appear that it was rendered under such circumstances of collusion between the parties as would amount to a fraud upon Wilcox."

AXFORD *v.* GRAHAM, 57 Mich., 422:

By the Court: "Judgments of Courts having jurisdiction are held conclusive upon parties and privies. But the reason why they are conclusive is because an opportunity has been afforded to the party thus concluded to assert or defend his right before the Court rendering the judgment. In this case, questions concerning the title to the horse are settled and concluded against all parties who have had an opportunity of contesting the title before the Court."

FITZPATRICK *v.* HOFFMAN, 104 Mich., 228:

By the Court: "It is insisted that there was no evidence that defendant's title to the land from which the timber was cut was not good. The reply to this is that he was tendered his day in Court to test this very question in a suit where his title was involved, and where it was his duty to appear and defend it. Having failed to do so, the judgment that suit concludes him."

SIXTH POINT.

As the defendant has been adjudged by the Michigan judgments to have been guilty of negligence toward the plaintiffs, the plaintiffs are entitled to recover from it their damages for this negligence in tort, irrespective of the existence or non-existence of any contract obligations between them; unless, of course, by the terms of such a contract the defendant was absolved from the consequences of its own negligence, or by the terms of the contract was actually required to perform the negligent act itself.

RICH *v.* NEW YORK CEN. & HUDSON RIVER R. R. Co., 87 N. Y., 382:

By the Court: "It is then doubtless true that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions in connection with it may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the *tort* grow out of the entire range of facts of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl., 135, that 'if a common law duty result from the facts, the party may be sued in *tort* for any negligence or misfeasance in the execution of the contract.'"

FROMM *v.* IDE, 68 Hun, 310; affirmed, 144 N. Y., 630:

The defendant had made a contract with the plaintiff to construct a ditch so that it would drain the plaintiff's land along the highway in an easterly direction. As the Court said: "The defendant so carelessly and negligently did the work that the

ditches, instead of draining the water off from the plaintiff's land, gathered the surface water and emptied it upon his land." Thereupon the plaintiff sued the defendant in tort for negligence. *Held*, that the action would lie.

By the Court: "Causing the water to be emptied upon the plaintiff's land was not necessarily connected with the performance of the contract. One who, while performing a contract to transport goods or passengers for hire, negligently destroys the property or injures the person of the passenger, is guilty of a *tort*, and liable in an action for negligence, notwithstanding the negligent act was performed while carrying out a contract. Had the defendant contracted to put a roof upon the plaintiff's house, and had performed the work in such a negligent and careless manner as to cause the plaintiff's property in the house to be injured by rain, he would be liable in an action for *tort*.

"*Plaintiff's right of action did not depend on the existence of a contract between himself and the defendant, but upon the fact that the defendant wrongfully and negligently did an act which injured the plaintiff's property.*

"Defendant owed a duty to the plaintiff not to injure his property by any wrongful or negligent act of his while performing the contract. That duty did not necessarily depend upon or grow out of the contract (Bickford *v.* Richards, 154 Mass., 163; Stock *v.* City of Boston, 149 *id.*, 410)."

BICKFORD *v.* RICHARDS, 154 Mass., 163:

This was an action in *tort* for negligently moving a building. The plaintiff had made a contract with one Powers to move the building, and Powers had subcontracted the work to the defendants. In the Superior Court the action was dismissed upon the ground that there was no privity of contract. In the Supreme Court the judgment was reversed.

By the Court: "It is immaterial whether the defendants are to be regarded as the servants and agents of the plaintiff, or as contractors under Powers, which the defendants contend was the case. In either instance, they owed to the plaintiff the duty of not injuring his property by their negligent or wrongful acts. * * * The plaintiff's right of

action does not depend on the existence of a contract between himself and the defendants, as would be the case if he were suing for damages resulting from some non-feasance on their part, but on the fact that they have wrongfully and negligently done, or caused to be done, something to his property which has injured it. The gist of the action is the breach by the defendants of the duty which they owed to the plaintiff not to injure his property by any wrongful or negligent acts of theirs. That duty did not depend on or grow out of contract." (Mr. Justice Holmes concurring.)

BARRETT v. LAKE ONTARIO BEACH IMPROVEMENT CO., 174 N. Y., 310:

By the Court: "This liability for injuries, attributable to the unfit condition of premises, which have been let [and, *semble*, manufactured or sold] for a specific purpose, rests upon negligence; that is to say, upon the omission of a duty to use due care in their erection or construction. The law holds the lessor responsible, not upon any contractual obligation, but because of the *delictum*. If, as claimed in this case, a person has erected a structure and designed it for the use of the public [and, *semble*, *a fortiori* for the use of his contractee], which was either structurally defective, or which was faulty in failing to afford what, in the judgment of reasonable men, would be a proper and adequate protection to persons using it, then he has incurred the risk of being made responsible for occurrences resulting in injury to any one by reason of the faulty construction."

SEVENTH POINT.

There was nothing in the defendant's contract with the plaintiff which required it to commit the negligent act complained of, to wit, the erection in the skylights of the 155° heads, without taking any care to

ascertain whether, when exposed there to the rays of the sun, they would be raised to that temperature by the heat of the sun if unprotected, or without taking any care to protect them.

1. There was nothing in the defendant's contract which required it to install any sprinkler heads in the skylights whatever.

It is quite true that the inspector for the Risks Commission testified that "good practice requires putting sprinkler heads in skylights" (*fols. 61, 85*). But it also appeared that he referred to ordinary skylights, open at the base; that he had never before seen a skylight like those in this building, with a glass floor as well as a glass roof (*fols. 63, 66*); and that, of course, he knew nothing of any practice in regard to them.

2. But assuming that the defendant's contract required it to put some kind of sprinkler heads in the skylights, there was nothing to prevent it from using its 212° heads, which it had at times made, as did other companies (*fols. 68, 69*), and no proof that these would not have passed the Inspector of the Risks Commission. The fact that it was not at that time manufacturing 212° heads was, of course, no excuse for its not manufacturing them if heads to fuse at that temperature were needed in the performance of its contract.

(3) There was nothing to prevent the defendant, if it was bound to use the 155° heads in the skylight, from protecting them by some simple device like a hood from the direct rays of the sun, and consequently from the danger of being raised above a temperature of 136°.

(4) There was nothing to prevent the defendant from removing all, as it did two, of the panes of

glass constituting the floor of the skylight, and thus insuring for it a temperature no greater than that of the room below; or from notifying the plaintiff to do this.

On the contrary, it has been held by the New York Court of Appeals, in considering the liability of a contractor under very similar circumstances, that it was the contractor's duty to take due care to ascertain whether the place in which he installed his apparatus was a suitable one for the purpose; and that for the failure to take such care he was answerable in damages to the owner.

KUMBERGER *v.* CONGRESS SPRING CO., 158 N. Y., 339, reversing 8 App. Div., 96:

The plaintiffs had made a written contract with the defendant "to furnish and erect in your building" a gas engine, "leaving the engine in satisfactory working order." They did erect it in the building at the place indicated by the defendant. After the engine had been in operation for a day or two it ceased to work satisfactorily, owing to the fact that its foundation was not solid. The plaintiff sued for the contract price and recovered a judgment which was affirmed in the Appellate Division, but reversed in the Court of Appeals.

By the Court: "The contract did not require that the plaintiffs should furnish the foundation, or the proper place for the engine; but they should have seen in erecting it whether a proper foundation existed. That was, of course, necessary to its continuous and satisfactory working and was a matter, presumably, practically within the plaintiffs' knowledge and experience. If, when delivering the engine, they found no proper place to erect it upon, they should have so informed the defendant's officers, and if then the latter did not cause such to be provided, and at their own cost, the plaintiffs might have declined to proceed with a work which would so soon, possibly, be rendered useless. There was that measure of duty owing from the plaintiffs to the defendant, and if they neglected it while performing that part of the contract relating to the setting up of the engine in a condition for its

satisfactory working, then it might well be that a question would be raised as to whether the defendant was not entitled to recover any damages resulting from the engine thereafter settling so as to be disabled from doing the work designed. That is to say, if the plaintiffs suffered the engine to be erected upon an inadequate and improper foundation, when a word of advice to the defendant's officers might have caused them to provide a proper place, then the plaintiffs should fairly be held responsible for any consequent damage which was a direct result."

EIGHTH POINT.

Neither was there any provision in defendant's contract exempting it from liability for its own negligence.

The defendant, to do it justice, has made no such contention. It is to relieve it from the warranty of fitness which, as the Circuit Court of Appeals held, would otherwise be implied, that it has relied upon this provision of the contract:

"No obligations other than herein set forth and made a part of this proposal and acceptance, shall be binding upon either party."

There can be no question that this language is insufficient to exempt from liability for negligence, even assuming that such an exemption, if explicit, would be valid.

"The general principle that contracts breaking down common law liability and relieving persons from just penalties for their negligence and improper conduct are not to be favored, and should not be given an enforcement beyond that demanded by their strict construction, has been announced by the courts with often repeated reiteration" (Johnston *v.* Fargo, 98 N. Y. App. Div., 436, 442; citing cases; among others, Kenney *v.* N. Y. Central R. R. Co., 125 N. Y., 422).

NINTH POINT.

If the defendant is bound by the Michigan judgments as adjudications that it was guilty of negligence in erecting the sprinkler in the skylights, it must be unnecessary to inquire into the correctness of the findings of the Circuit Court that the plaintiff used first-class materials and did workmanlike work; or the finding of the Circuit Court of Appeals that no warranty of fitness can be implied.

If these findings are consistent with the adjudication of negligence, they are immaterial. If they are inconsistent with it, they are condemned by it.

TENTH POINT.

The Circuit Court of Appeals was right in holding that the defendant's apparatus as erected was unfit for the purpose it was designed to serve, and that a warranty of such fitness would be an implied obligation of its contract; unless excluded from it by the saving clause already quoted, and hereafter discussed.

On this point the Referee had fallen into the error of holding that the case presented "is one as to a machine or apparatus specifically designated in a contract, which has been installed and delivered in accordance with the stipulations of the contract" (fol. 166).

If this were true there could be no implied warranty as to what the apparatus would or would not accomplish. But in fact, when the contract was made there was not then in existence, and never had been, and never would be, another "machine or apparatus" like that which the defendant contracted to erect; nor was any such machine or apparatus "specifically designated in the contract." The contract specified nothing more than that "a system of wet pipe Grinnell automatic sprinklers should be furnished and erected," and that it should consist of sixteen rows in each story of the building of fourteen sprinklers each. Nothing was specified as to where in any story of the building any sprinklers should be located, nor what should be the material or the fusing point of any sprinkler. The determination of all these questions was left wholly to the experience and judgment of the manufacturer. The plaintiffs not only "knew nothing as to the proper method and arrangement of anautomatic fire extinguishing apparatus" (fol. 24), and "had no knowledge of the proper construction for the sake of safety of the sprinkler apparatus or the proper mode of arranging it" (fol. 26), but were not even consulted by the defendant about the preparation of the plans ("The Bagley Estate had nothing to do with the preparation of the plans") (fol. 85), and relied wholly upon the defendant in the matter. ("The sprinkler people prepared the plans for the installation work, and we relied as regards the propriety and safety of the installation upon their reputation.")

Under such circumstances the Circuit Court of Appeals correctly held both that a warranty of fitness should be implied and that it was broken.

"We are not satisfied that the system was so installed as to be suitable for the purpose for which it was ordered, namely, with heads which would fuse and permit the water to flow in case of fire, and would retain the water on all other occasions. And we do not wish to be understood as holding

that if this was merely the ordinary contract of a manufacturer to furnish work and materials for a particular purpose, the doctrine of an implied warranty of fitness would not be applicable. It does not appear that the owners of the building had any knowledge whatever as to the construction or installation of such a system. The work was in charge and under the control of the manufacturers, to be prosecuted according to their judgment, subject only to the approval of the Risks Commission. And it is urged with great force that they might have installed a safe apparatus, suitable for the purpose for which it was ordered, either by providing heads which would fuse at a higher temperature, or by protecting the heads furnished from the rays of the sun in the skylight, or by the adoption of other appropriate measures for guarding against such a disaster (fol. 223). * * * The defendant agreed to install a system which was intended not only to discharge water in case of fire, but to retain the water under all other circumstances; and the plaintiff, confiding in the reputation and experience of the defendant, entrusted to it the plan and execution of the work. *It is therefore peculiarly a case in which a warranty of fitness would ordinarily be implied*" (fol. 226).

To the same effect, see

Kellogg Bridge Co. v. *Hamilton*, 110 U. S., 108;
Hoe v. *Sanborn*, 21 N. Y., 552, 562;
Cleveland Linseed Oil Co., v. *Buchanan*, 120 Fed. Rep., 906.

ELEVENTH POINT.

The provision of the contract that "no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party," does not exclude from the contract the warranty of fitness which would other-

wise be implied. Or, if it does, it is only because such a warranty of fitness must be included in the express covenant of the contract: "all the materials to be first-class and all work herein specified to be done in a thorough and workmanlike manner."

1. The position of the defendant on this subject is simplicity itself; but comes perilously near a *reductio ad absurdum*. It seems to be as follows:

> "The plaintiff should have understood this saving clause of our proposal as a warning that no warranty of fitness could be implied. Our promise that the materials should be first-class and the work thorough and workmanlike, was not expressed to be made, and the plaintiffs should not have understood it to be made, with reference to any particular environment, either in their building, or elsewhere. If our work and materials were such as might be considered workmanlike and first-class in some situation, we fulfilled our contract; although they were such that under the circumstances presented in defendant's building they were liable to flood it at any time with water. If such solder as we used was first-class solder, there was nothing in our contract with the plaintiff to prevent our erecting a sprinkler head composed of it, which would melt at 155°, immediately over a steam radiator which, when in use, would raise it to a temperature of 212°."

If this position be unsound, it can only be because in some way under their contract the defendants were bound to use ordinary care that their apparatus when completed should be reasonably fit for the purposes intended; among them, that of retaining the water except in case of fire. Any such admis-

sion is fatal to the defendants under any possible view of the case; for it at once clinches the estoppel of the Michigan judgments that such ordinary care was not exercised.

2. The purpose of this saving clause, as those to whom it was proffered were entitled to read it, could not possibly have been to exclude from the contract the various obligations which the law would imply from it and of which a warranty of fitness was only one. Any such construction of it would exempt the defendant from due diligence in the performance of its contract, giving it an indefinite time in which to perform it; and would have permitted it to erect its pipes throughout the building in such a manner as to make the building useless to its occupants. The written proposal is as silent with regard to these implied obligations of the contractor as it is about a warranty of fitness. Its silence is even less of a justification for excluding the one than the others; since, as was said in *Hoe* v. *Sanborn*, 21 N. Y., 552, 564, *supra*, this obligation is one in which the law rests "upon principles foreign to the actual contract; principles which are strictly analogous to those on which vendors are held liable for *fraud*."

3. The clause was doubtless intended to prevent either party from asserting against the other a claim that either in correspondence or in talk, other undertakings had been made than those which the law would find in or imply from the written proposal and acceptance. It would exclude, for example, a warranty by the defendant that in case of a fire its apparatus would extinguish the fire; or a warranty by the plaintiff that its skylights were such that sprinklers, of whatever low degree of fusibility, might be safely placed there.

TWELFTH POINT.

The assumption by the defendant of the plaintiffs' obligation to its tenants to exercise ordinary care in erecting this apparatus to prevent its flooding the building when exposed only to the heat of the sun, does not depend upon any warranty of fitness to be implied by law from the contract. The obligation was explicitly assumed by the express provision of the contract that the work should be done in a thorough and workmanlike manner, and its materials be first-class.

1. An agreement that materials shall be first class must mean, not that they shall be first class for other purposes and in other places, but that they shall be first class for the situation in which they are to be put and for the purposes which they are designed to serve there; *e. g.*, in the case of the sprinkler heads in these skylights, that their material shall be first class for the purpose both of retaining the water under the solar heat alone which they would encounter there, and of discharging it in case of fire in the building. Obviously, the word "first-class" can have no absolute meaning. There is necessarily implied a reference to the function the material is designed to perform. Pine wood may be first-class material for a packing case, but not for a pianoforte.

The solder in defendant's sprinkler heads which they made to fuse and which did fuse at 155°, was undoubtedly "first-class" solder. So undoubtedly the solder which they might have made and used instead to fuse at 90° would have been first-class solder. But one would have been only less unfit for its purpose than the other; and both were equally far

from being "first-class material" in the sense which the defendants designed those words in their proposal to convey to the plaintiffs.

2. So of the defendant's agreement that its work should be thorough and workmanlike. It was a part of its work to determine where the sprinkler heads should be placed. It could be neither thorough nor workmanlike to place them where a thorough and workmanlike study of the situation would have shown the defendant that the sun alone would fuse them on the first hot summer's day. It was uncontradicted that any study at all of the situation would have shown the defendant exactly this.

A temperature of 94 degrees in the shade "was not an unusual or extraordinary temperature" for Detroit in the summer (fol. 47); where a maximum has been recorded of 101° in the shade (*Ibid.*). A temperature of 94 degrees in the shade means a temperature in the sun of from 110° to 135° (Defendant's witness Jardine, fol. 67). A temperature of 110° to 135° in an ordinary skylight, open below, means in an enclosed skylight like the plaintiff's a still higher temperature, say, of from 125° to 145° (fols. 51, 52, 45, 67). These facts should have been, not matter of speculation, but of observation with the defendant, since it was actually working in the building containing these skylights during the whole summer of 1896 (fols. 26, 44, 29).

In air at a temperature of only 125° the defendant's dark sprinkler heads, owing to their power of absorbing radiant heat, would, according to the concurrent testimony of both the defendant's experts, Professors Hallock and Denton, necessarily reach a temperature of from 15° to 20° higher, say, 140° to 150° (fols. 81, 83). It is the express testimony both of the Risks Commission Inspector, Jardine (fol. 66), and of the defendant's manager, Dawley, that there should be 30° to 40° leeway or margin of safety between the temperature to which the

sprinkler head might be raised by sunshine and its fusing point. As in these skylights the summer's sun was bound to heat these sprinkler heads, as has been seen, to a temperature of 140° to 150°, the defendant left a "leeway" of but 5° to 15°, at most; and was so convicted by its own witnesses of ignoring its own standards for "thorough and workmanlike work."

3. This express agreement of the defendant, that its materials should be first-class and its work thorough and workmanlike, constituted a warranty, the remedy for a breach of which,—certainly for a defect not obvious upon inspection to unskilled persons like the plaintiffs,—survived acceptance.

Shippen v. *Bowen*, 122 U. S., 575, 581.
Cleveland Linseed Oil Co. v. *Buchanan*, 120 Fed. Rep., 906 (U. S. Circ. Ct. of App., 2d Circ.).
Lichtenstein v. *Rabolinsky*, 98 App. Div. (N. Y.), 516.
Bull v. *Bath Iron Works*, 75 *Id.*, 380.

It is obvious that the plaintiffs expected to rely upon the warranty and not to determine for themselves by inspection, whether the materials used had been first-class or the work done in a thorough or workmanlike manner. They knew nothing either of the theory or practice of the installation of a sprinkler system, and might have examined every square inch of the piping with a microscope and been none the the wiser for it. In the face of the admitted fact that the actual inspection made by the expert of the Improved Risks Commission (Jardine) failed to suggest even to him the defects subsequently developed, it is idle to argue that to the plaintiffs, on the contrary, they were obvious, and hence waived by acceptance.

4. Nor is the fact that an inspection by the Risk Commission was contemplated by the contract in

any way inconsistent with the survival of a warranty relating to other matters than those to which the inspection was directed. Upon this point the case of *Carleton* v. *Lombard, Ayers & Co.* (*149 N. Y., 137*) is a direct authority. There likewise acceptance by the buyer followed an inspection and a certificate by the inspector that the color, test and gravity of the merchandise corresponded with the contract. Neverthless, the remedy for breach of warranty of other qualities was held to survive. To the same effect is the case of *Mercantile Trust Co.* v. *Hensey*, 205 U. S., 298, 308, *infra*.

THIRTEENTH POINT.

The defendant's further agreement that its work and materials should be in conformity with the Improved Risk Commission standard, did not, as the Referee erroneously held, supersede or impair its other express agreement to do workmanlike work and use first-class materials in the manufacture and erection of the pipes and sprinklers, and therefore to use at least ordinary care that there should be no flood when there was no fire.

This was quite as important to the plaintiffs as that there should be a flood if there should be a fire. But it is only in the latter point that the Improved Risk Commission was interested. The inspector who on their behalf approved the system, testified in so many words that he was in the employment of the Fire Insurance Companies for the ultimate benefit of the Fire Insurance Companies; and that in so far as they were concerned,

there would be no loss to them "if the system should go off even when there was no fire," and that it was the interest of the Fire Insurance Companies he had in mind when making his inspections (fols. 63, 64).

Accordingly it was that the plaintiff did not agree, nor did the defendant stipulate, that whatever work and materials might pass the inspection of the Improved Risk Commission should be deemed first-class and workmanlike; but that they should pass this inspection *and* be first-class and workmanlike.

MERCANTILE TRUST CO. *v.* HENSEY, *205 U. S., 298, 308:*

By the Court: "A contract which provides for the work on a building to be performed in the best manner and the materials of the best quality, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, does not make the acceptance by the architect final and conclusive, and will not bind the owner or relieve the contractor from the agreement to perform according to plans and specifications. *Glacius* v. *Black*, 50 N. Y., 145; *Fontano* v. *Robbins*, 22 App. D. C., 253."

FOURTEENTH POINT.

Nor can the defendant escape this, its express obligation, that its work should be thorough and workmanlike and its materials first-class, by the plea, that it was impossible for it to perform both this obligation and its other obligation to procure for this work and these materials the approval of the Improved Risk Commission.

(*a*) The contract with these two obligations was the only one which the plaintiffs could wish to have

performed, and it was the contract which the defendant made. Impossibility of performing it, even if it had been proved, could be no excuse for foisting upon the plaintiffs another contract than the one they had made, or for the defendant's failure to perform the one which it did make.

WALD'S POLLOCK ON CONTRACTS, 3rd Ed., p. 529 [409].

If performance had been indeed found to be impossible, the defendant should have notified the plaintiffs of the fact; and any resultant damage which it might then have had to meet would have been trivial compared to that which it rather chose to risk inflicting upon the plaintiffs by performing another contract than the one it had made with them. The situation with which the defendant claims to have been confronted is virtually the same as that presented to the contractor in the case of Kumberger *v.* Congress Spring Co., 158 N. Y., 339, *supra;* and its duty, in the face of it, may virtually be stated in the words of the Court of Appeals in that case:

"If, when delivering the engine (the sprinkler apparatus), they found no proper place to erect it upon, they should have so informed the defendant's officers (plaintiffs), and if, then, the latter did not cause such to be provided, and at their own cost, the plaintiffs (defendant) might have declined to proceed with a work which would so soon possibly be rendered useless. There was that measure of duty owing from plaintiffs (defendant) to the defendant (plaintiffs)."

However, as is to be expected, there is no evidence whatever that it was impossible, or in the least degree difficult, for the defendant to do thorough and workmanlike work and use first-class materials, and yet obtain the approval of the Improved Risks Commission. The only finding of fact upon this point which the Referee made or which the evidence could warrant is the following (fol. 98):

"Had the other sprinkler heads, to wit, those intended to fuse at 286° Fahrenheit, been placed in

the said skylights, the same would have been ordered out by the Inspector of the Improved Risks Commission who made the inspection of the said installation for the Improved Risks Commission."

But—

(1) 286° heads were in point of fact installed in the boiler-room, where they were exposed to a lower temperature than those in the skylights (fols. 55, 63, 66), and these passed the inspection.

(2) There was nothing to prevent the defendant from using in the skylight the 212° heads which it at times made, as did other companies (fols. 68, 69), and no proof that these would not have passed the inspection; or, if the defendant was bound to use the 155° heads in the skylight, nothing to prevent from protecting them by some simple device like a hood from the direct rays of the sun, and consequently from the danger of being raised above a temperature of 136°; or from removing all, as it did two, of the panes of glass constituting the floor of the skylight, or notifying the plaintiff to do it; and so insure for it a temperature no greater than that of the room below (see Point Seven, *supra*).

FIFTEENTH POINT.

It was error for the Court to exclude against the exception of the plaintiffs (*fol. 57*) the admission of the defendant's General Manager, Dawley, that it was unworkmanlike to have placed 155° heads in the skylights (*l. 169*, 5th Assignment of Error).

When the question to elicit this admission was put to this witness it had already appeared that he

was the "Chicago agent of the defendant" (*fols. 26, 27*), in charge of the department which included both Chicago and Detroit, and the representative of the defendant with whom the plaintiffs negotiated their contract (*ibid*); that it was in fact by him that the written contract had been executed on behalf of the defendant (*fols. 93, 94*), the execution of this contract being admitted by the answer (*fol. 15*); that after the disaster the same person, Dawley (*fol. 28*), being then still "the Manager of this concern in Chicago," had come to Detroit to investigate the accident, had in consequence of it sent to the plaintiffs for use a box of their harder 286° heads (*fol. 28*) and had arranged with the plaintiffs for compensation to them for the damage to their building, which was thereupon paid by the defendant. (This latter question had been excluded against the exception of the plaintiffs, who are, therefore, for this purpose entitled to the benefit of the answer expected to be elicited.) The admission in question, therefore, that it was unworkmanlike to have used 155° heads in the skylights, was made by the Departmental Manager of the defendant corporation while engaged in its business in verifying the plaintiffs' loss and in settling with it for the damage done. Under such circumstances, the admission was competent, and as it was undeniably material evidence against the corporation, it was error to exclude it.

McGENNESS *v.* ADRIATIC MILLS, 116 Mass., 177:

The action was for a nuisance. After the alleged nuisance had been in existence for some time, upon complaint being made to the defendant, the defendant's Superintendent said, "I wouldn't have it (the nuisance) around my place as it is around there for $500."

Held, that the admission was properly received in evidence.

By the Court: "The defendant is a corporation and can only act through agents, and, in the absence of any evidence to the contrary, the Superintendent

in charge of the mill must be deemed the proper person to whom to make complaint and to have authority to give information and direction in regard to the drainage from it. His recognition that it was a matter that required to be attended to and should be, was therefore properly put in evidence."

DOWDALL *v.* PENNSYLVANIA R. R. Co., 13 Blatchford, 403:

One of the defendant's towboats had sunk the plaintiff's canal-boat. After the accident the agent of the defendant company in regard to towboats, having examined the scene of the accident, admitted in conversation to the plaintiff that the boat was a total loss.

Held, that the admission was competent evidence against the defendant corporation on the subject.

NOWACK *v.* METROPOLITAN ST. RY. Co., 166 N. Y., page 433:

Action for personal injuries. The plaintiff attempted to show on the trial that one Kaufmann, employed by the defendant company to find evidence and to "see to" witnesses, so as to enable it to defeat the plaintiff's claim, had attempted to bribe witnesses. On objection the trial court excluded the evidence. Held error.

By the Court: "The scope of the business intrusted to him included whatever he thought best to do in order to get the right kind of witnesses. He was not working for himself, but for the defendant, and, as he represented it with reference to the subject of witnesses, his conduct not only tended to show that his case was weak, for witnesses are not bribed unless it is thought necessary, but to cast a doubt upon the testimony of the other witnesses who were looked up by him and sworn by the defendant. It indicated as the result of his investigation for the defendant that honest witnesses could not be procured who would swear to a defence. If he could not make a mere admission as such, he could do an act which had the effect of an admission. His declarations, *dum fervet opus*, were acts."

WHARTON LAW OF EVIDENCE, 3rd Ed., Vol. 2, Sec. 1177:

"As has been already incidentally seen, a party who commits the management of his whole business or of a particular line of his business to an agent, is bound by the admissions of the agent, as to his entire business committed to him; nor, when the agent is a general agent representing his principal continuously, is it necessary for the admission of such declarations that they should either have been part of the *res gestæ*, or should have been specially authorized. Eminently is this the case with corporations. Thus, it has been held in England that on a suit against a Railroad Company for a lost parcel, a statement made by the Station Master, generally representing the defendant, intimating that the parcel was stolen by a porter of the defendant, is admissible against the defendant."

See also

VAUGHN MACHINE CO. *v.* QUINTARD, 37 App. Div., 368.

BOOTH *v.* CLEVELAND, &C., CO., 74 N. Y., 15.

NORTHERN PACIFIC R. R. CO. *v.* KEMPTON, 138 Fed. Rep., 992, C. C. A.

NEW JERSEY STEAM BOAT CO. *v.* BROCKETT, 121 U. S., 637.

LAST POINT.

The judgment below should be reversed, with costs to the plaintiffs in error, and the case remitted to the Circuit Court of Appeals, with instructions to reverse the judgment of the Circuit Court, and to order a new trial.

H. B. CLOSSON,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 96.

Office Supreme Court
FILED
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JAMES H. McKEN

JOHN N. BAGLEY,

Plaintiff-in-Error,

vs.

GENERAL FIRE EXTINGUISHER CO.,

Defendant-in-Error.

In Error to United States Circuit Court of Appeals for the Second Circuit.

Brief for Defendant-in-Error.

PETER B. OLNEY,

Of Counsel for Defendant-in-Error.

B. H. TIERNEY, PRINTER, 206-8 FULTON STREET, NEW YORK.

SUPREME COURT OF THE UNITED STATES.

JOHN N. BAGLEY,
Plaintiff in Error,
(Plaintiff below),

against

THE GENERAL FIRE EXTINGUISHER COMPANY,
Defendant in Error,
(Defendant below).

Brief for Defendant in Error.

Error to the Circuit Court of Appeals for the Second Circuit to review a judgment affirming a judgment of the Circuit Court for the Southern District of New York, which had dismissed the complaint upon the merits.

The defendant in error is obliged to controvert, in some respects, the statement of the case contained in the brief of the plaintiff in error. The judgments in the Michigan courts did *not* adjudge that the defendant in this action "had been guilty of negligence which was the proximate cause of the damage in question." The Michigan judgments adjudged that the defendants in the Michigan

suits, to wit, the plaintiffs in this suit, were guilty of negligence in respect of their contract.

The General Fire Extinguisher Company was not a party to the record in the Michigan suits; they were notified of the actions and requested to defend; but the estate of John N. Bagley defended the said action (25th finding of fact, folio 114). The Michigan actions did not adjudicate the liability of the defendant, The General Fire Extinguisher Company, to the plaintiff herein or to his assignors (27th finding of fact, folio 114). The Michigan judgments did not construe or adjudicate the agreement in question between this defendant and the said estate of John N. Bagley or the acts of the defendant under said agreement (28th finding of fact, folio 115). See the conclusion of law of the learned referee (5), at folio 117, that said judgments "did not adjudicate that the opening of the said sprinkler-heads, as found in the fifteenth finding of fact herein, and the flowing of water by reason thereof, and the consequent damages, were the fault of this defendant", &c. * * * "And did not determine in any respect that the defendant herein was negligent", &c. The quotation at page 9 of plaintiff's brief is from the *opinion* of the court in one of the Michigan cases and not from the judgment and, it needs no citation of authorities for the proposition, that the language of the *judgment* and not the language used by the judges in their *opinion* governs in the application of the rule of *res adjudicata*. The judgment records were put in evidence upon the trial (folios 30-32), and by the twenty-seventh and twenty-eighth findings (folios 114-115), the learned referee found they did not adjudicate the liability of the General Fire Extinguisher Company.

On page 2 of Plff.'s brief, the undertaking or agreement of the owners with their tenants (who were plaintiffs in the Michigan action) "to instal in the premises a suitable automatic sprinkler system, so-called", &c., is recited, and the further statement is made that the plaintiffs "made a written contract with the defendant (that is, the Fire Extinguisher Company) for the equipment of their building with such a system;" that is, with "a suitable automatic sprinkler system." *Such* was *not* the agreement made by the defendant. This appears from an examination of the written contract, which is set forth by the referee in the third finding of fact (folios 93-95). The defendant agreed to furnish a specific system known as "Wet Pipe Grinnell Automatic Sprinklers" (fol. 93), such system and work to be in "conformity with the Improved Risks Commission standard for Automatic Sprinkler Installations." Attention is called to the letter sent by plaintiff to defendant along with their acceptance of the contract (Fourth finding), at folio 96, in which occurs the following language: "We trust that you have made no mistake, for we expect the system to be approved by the insurance companies before its acceptance."

The object that the plaintiff had in installing this sprinkler system, was to obtain for themselves and their tenants reduced rates for fire insurance (8th finding of fact, fol. 97). The Improved Risks Commission was an association of fire insurance companies, one of the objects of which was to inspect buildings in the city of Detroit, for the purpose of ascertaining the fire hazard upon them, and the condition and fitness of any sprinkler devices installed, in order to aid the insurers

in ascertaining, the proper rate of insurance to be applied to the buildings (fols. 96-97, 7th finding). To obtain a reduced rate of insurance, it was necessary that the system, and its installation should be inspected and approved by the Improved Risks Commission. Before the system was installed by the defendant "a plan of the equipment, showing the location of the sprinklers throughout the building, was made by the defendant, submitted to the Improved Risks Commission and received their approval (tenth finding, fol. 97) and such plan showed the sprinkler-heads to be located in the skylights in said building, and designated that the sprinkler-heads so to be located were ordinary "heads," meaning those intended to fuse at 155° "Fahrenheit" (eleventh finding of fact, fol. 97).

After the sprinkler system was installed and before it was accepted and paid for by plaintiff, the system was inspected by the Improved Risks Commission. This inspection included an examination of the sprinkler-heads in the skylights, the manner in which they were placed and the fact that these were sprinkler-heads intended to fuse at 155 degrees. Said heads were plainly marked 155° (twelfth finding, fol. 98).

Upon said inspection, the Improved Risks Commission approved the installation of the system by the defendant, and because of such approval the insurance rate upon the building and the contents was materially reduced (thirteenth finding, fol. 98). The Grinnell sprinkler-heads ordinarily in use were 155° and 286°. They had not for the last few years made any of degrees intermediate between 155° and 286° (fol. 69). It was proper practice at the time to place in the skylights in

question sprinkler-heads intended to fuse at 155° Fahrenheit. *Had the other sprinkler-heads, to wit, those intended to fuse at 280°, been placed in the skylights, the same would have been ordered out by the inspector of the Improved Risks Commission who made the inspection* (fourteenth finding, fol 98; fols. 61-62).

The accident occurred on Sunday, July 4, 1897. There was no watchman on the premises during the daytime on July 4th (fol. 38). There were large swinging windows in the skylights and also ventilating pipes. The windows, when open, allowed a free draft of air through the ventilators. The windows were closed, but the iron ventilators were left open in the skylights (fol. 37), and so remained, at the time of the accident. The sprinkler system was supplied with an automatic gong. In case one of the sprinkler-heads opened, the gong would ring (fol. 38). The gong was ringing at the time the accident was discovered. "If anyone had been on the premises at the time the gong first sounded, the flow of water could have been turned off at once, so there would not have been any serious damage." The testimony of the plaintiff's witness Phillips (fol. 43). The sprinkler-heads did not fuse at less than 155°, the temperature at which they were intended and marked to fuse (seventeenth finding of fact, fol. 99). On the trial the plaintiff at first undertook to prove that there were defects in the materials or construction of the sprinkler-heads. The defendant showed conclusively that no such defects existed, and upon the oral argument counsel for the plaintiff conceded there were no defects in the materials used and said he was willing the court should find, as a fact, that they

were up to the standard sprinkler-head which the defendant furnished marked 155° (fol. 167). The learned referee found (sixteenth finding of fact) that the sprinkler-heads fused "because of the extraordinary degree of heat in the skylight at the time of said fusing" (fol. 99), and further that said extraordinary temperature was caused by the sun's rays shining through the skylight and by lack of drafts of air in said skylight and by reason of other and extraordinary physical conditions, none of which conditions was caused by the defendant, and all of which were without the fault of the defendant (eighteenth finding of fact, fol. 99). July 4th was a hot day (fols. 38-41). The shutting of the windows in the skylights, each window being 22 inches x 50 inches (fol. 50), kept out the drafts of air, which drafts would have much reduced the temperature in the skylights. The heat of the day was extraordinary from two facts—first, that the thermometer reached 94° at three P. M. and continued at that point until 6 P. M., and second, on that day there was one hundred per cent. of sunshine (fols. 145-146). The plaintiff testified (fols. 16-17) "I knew the general purpose of the gong; that it was intended to give the alarm in case the water came out of the pipes." No watchman was employed by the Bagley estate; there was no day watchman employed by the tenants; there was no watchman on the premises during the day of July 4th (fols. 30, 38, 40). *It is clear that, if there had been a day watchman in the building at the time of the accident, the water would have been shut off at once, and there would have been no damage.*

The counsel for the plaintiff seeks to create the impression, that the plaintiff was wholly ig-

norant of the defendant's system, and made no suggestions with respect to the installation of the system, but at folio 96 it will be seen that plaintiff made a suggestion as to the gravity tank, and it appears that the defendant had equipped with their sprinkler apparatus another building of plaintiff a short time before (fol. 24). This other sprinkler plant was installed by the defendant in a building of the plaintiff's in the rear of the portion of the buildings in question (fol. 25). Mr. Bagley and his associate, Mr. Hopkins, very frequently visited the premises while the sprinkler plant was being installed (fol. 25). At folio 27 it appears by a letter of plaintiff to the defendant's agent, dated July 22, 1896, while the system was being installed that they suggested changes as to the position of the pipes. At folio 87 plaintiff's agent looked over the building with Mr. Bagley before the work was done, for the purpose of making up data as to how much plaintiff would charge for the work, and how many sprinkler-heads would be put in.

FIRST POINT.

This writ of error must be dismissed for want of jurisdiction.

Section 6 of the Act of March 3, 1891, provides that "the judgments or decrees of the Circuit Courts of Appeal shall be final, in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy,

being aliens and citizens of the United States, or citizens of the different States."

Here the jurisdiction of the court is entirely dependent on opposite parties being citizens of different States. See the complaint (fol. 5), where the plaintiffs are alleged to be citizens and residents of diverse States, while the defendant is alleged to be a domestic corporation organized under the laws of the State of New York and a citizen and a resident of the Southern District of New York.

No provision of the Constitution or laws of Congress is mentioned in the pleadings, much less set forth as a ground of jurisdiction. Judgments obtained by the tenants against the landlord for the damages caused by the accident are set forth; that the defendant was notified of the action in the Michigan court and requested to defend. That judgments were obtained against the plaintiff in those actions; that the plaintiff had incurred and paid certain expenses in the defence of the actions and had paid the judgments, and the plaintiff here in this action demands judgment for the amount so paid, with interest. The claim of the plaintiff is that the defendant is concluded by the judgments in the Michigan courts; that those judgments are *res adjudicata* in this action upon the liability of the defendant.

The plaintiff's counsel claims that a federal question is involved here, by reason of the provision in the first section of article four of the constitution that "full force and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." No such contention was made below. In fact, full force and credit was given to the judgments of

the Michigan courts. They were admitted in evidence; they were treated exactly as if they had been judgments of the State of New York or of the Circuit Court in the Southern District of New York. The question as to their validity does not arise. The question is, does the doctrine of *res adjudicata* apply? This is a question in the domain of general jurisprudence. It is not a federal question. It is not a question arising under the constitution nor under the laws of congress. The learned counsel for the plaintiff speaks "of the lamentable conflict of the two courts in Michigan and New York, rendering judgments upon the same questions between the same parties." There is no such conflict. The question adjudicated in the Michigan courts was one case; the question litigated in the New York court was an entirely different one. The liability of the plaintiff on a contract made by them with their tenants was adjudicated in the Michigan courts, while in the New York court a liability of the defendant to the plaintiff was adjudicated upon an entirely different contract.

Again, the plaintiff's counsel contends that every question upon which the rights of the plaintiff to a recovery against the defendant depends, would have been held in the Michigan courts to have been conclusively determined against it, by the former judgments of the Michigan court. This is an error. If the plaintiff had sued the defendant in the Michigan court and for his cause of action depended upon the former Michigan judgment alone, he would have been defeated, for the doctrine of *res adjudicata* is applied in the same way by the Michigan courts to the question involved as by the New York court.

In Reynolds *v.* Aetna Life Insurance Company, 160 N. Y., 635, it was held that a judgment is not conclusive in a second action, unless the same question was material and at issue in a former suit, of which the court had competent jurisdiction, and a subsequent action is between the same parties or their privies.

> "It is final only" (say the court, at p. 652) "as to facts, litigated and decided, which relate to the issue and the determination of which was necessary to the determination of that issue."

The defendant did not owe the same duty to the Bagleys as the Bagleys owed to their tenants. The Bagleys, the Michigan courts said, were bound under their contract to give their tenants "a suitable automatic sprinkler"; that is, one which would answer the purposes intended. The Bagleys were free to instal any system they chose. The contract between the Bagleys and the defendant was not the same as between the Bagleys and their tenants. As between the Bagleys and the defendant here, the defendant's duty was to fulfill its contract, and that contract was to install a designated apparatus, in conformity with the standard of the Improved Risks Commission.

In Prescott *v.* Leconte, 83 App. Div., 482 (N. Y. Sup. Ct.), the court in their opinion, at page 585, say:

> "It is sufficient that, between him and the party sued, the duty for a violation of which the action is brought, rests primarily upon him, and that the material facts have been litigated in a former action, of which he had notice, and an opportunity to defend."

No duty towards the tenants rested upon the defendant.

To turn to the Michigan courts, in Bond *v.* Markstown, 102 Mich., 11, the Court say (page 16):

> "A former adjudication of the right of action, where the court had jurisdiction of the subject-matter and of the parties, is unquestionably a bar to an action for the same debt or claim, and is conclusive where the same subject-matter is sought to be again litigated, no matter how, between the same parties. In such case it is no answer to say, 'There were questions which were not raised or litigated.' It is enough if they might have been raised and litigated. But it is a different matter when an action is sought to be maintained, or defeated by showing a former adjudication of questions upon which it depends. In such case it must appear that such questions were litigated as a matter of fact; that they were submitted to and decided by the jury or court, and that they were not collateral inquiries, but were crucial questions in the other controversy (citing cases).
>
> "That an adjudication in favor of a claim will "not be conclusive of the issue or issues on which the right depended, unless it appears not only that they were submitted to the jury but that they were considered and passed upon by them, is supported by the following authorities (citing cases of other States). The question may become one of law if the record contains the conclusive evidence of it, but it may happen that the record is not conclusive. In such cases, according to the great weight of authority, parol evidence is admissible to ascertain whether a given question was in issue, litigated, submitted and decided, and possibly, in some cases, whether it was material."

That the liability of the defendant, the Extinguisher Company, was not litigated in the Michigan case appears by the charge of the trial judge, Judge Frazer, in that case. The following is from the charge as it appears in the printed record of that case:

> "Another proposition is raised here, as I understand by the argument in this case, which I might as well allude to now in this connection, and that is, that it has been said to you, or in your presence, that the Sprinkler Company is not a defendant in this issue. That is none of your business. If the Sprinkler Company is liable to Mr. Bagley or not, is a matter of no concern to you; that is a matter of subsequent consideration, in a proper case, if it should be brought to the consideration of a court and jury, but it is not in issue in this controversy now before you."

It is quite clear that, if the plaintiff had sued the defendant in the Michigan courts, relying solely upon the former judgments, the Michigan courts would have decided against him. The construction put by this court upon sections 5 and 6 of the Act of Congress of March 3, 1891, confining the jurisdiction of the Circuit Court of Appeals, disposes of the contention of the plaintiff in this regard, and shows that this Court has not jurisdiction to entertain this writ of error. In other words, that the judgment of the Circuit Court of Appeals is final.

The jurisdiction here referred to is the jurisdiction of the Circuit Courts as originally invoked. Where diverse citizenship is the only ground of jurisdiction appearing upon the face of the record at the time the jurisdiction of the

federal court was invoked, the decision of the Circuit Court of Appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings.

Arbuckle *v.* Blackburn, 191 U. S., 408.

In this case, the bill of complaint set forth the diversity of citizenship. In addition, the bill alleged in substance that if the statute of the State of Ohio involved in the controversy should be construed as the respondent claimed it should be, the statute was a regulation by the State of Ohio of interstate commerce and was repugnant to and in violation of the third clause of section 8 of Article I. of the constitution of the United States and void. This court, the chief justice delivering the opinion, held that the appeal must be dismissed, "because the jurisdiction of the Circuit Court was 'dependent entirely upon the opposite parties to the suit or controversy being citizens of different states,' and the decree of the Circuit Court of Appeals was final. Act of March 3, 1891, 26 Stat. at L., 826, chap. 517, sec. 6, U. S. Comp. Stat. 1901, p. 550."

In the course of the opinion, the court say:

> "In the present case the Circuit Court had jurisdiction on the ground of diverse citizenship; but it is now contended that jurisdiction also rested on the ground that the suit was one arising under the Constitution of the United States.
>
> "The rule is firmly established that a suit does not so arise, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by

> a statement in legal and logical form, such as is required in good pleading. Defiance Water Co. *v.* Defiance, 191 U. S., 184, *ante*, 140, 24 Sup. Ct. Rep., 63, and cases cited."

In the case at bar, there is no "dispute or controversy as to the effect or construction of the constitution." The question is how must the rule of *res adjudicata* be applied in the case of certain judgments? To the same effect is the suit of Spencer *v.* Duplan Silk Company, 191 U. S., 526.

The decisions of this court are numerous and uniform to this effect, that the judgment of the Circuit Court of Appeals is final, in all cases in which the jurisdiction of the Circuit Court attaches, solely by reason of diverse citizenship. In the case at bar, the jurisdiction depends solely upon diverse citizenship. Supposing that all the plaintiffs were citizens and residents of the Southern District of New York, could they have brought the action in the Circuit Court against the defendant, a New York corporation, because they alleged in their complaint the recovery of the Michigan judgments and that those judgments were *res adjudicatæ*? It is plain that the Federal Court would have no jurisdiction in such an action.

In American Sugar Refining Company *v.* New Orleans, 181 U. S., 277, this court, the chief justice delivering the opinion, remaked:

> "Thus, it was held in Loeb *v.* Columbia Twp., 179 U. S., 472, *ante*, 280, 21 Sup. Ct. Rep., 174, where the jurisdiction of the Circuit Court rested on diverse citizenship, but the State statute involved was claimed in defense, to be in contravention of the Constitution of the United States, that a writ of error could

be taken directly from this court to revise the judgment of the Circuit Court, although it was also ruled that the plaintiff might have carried the case to the Circuit Court of Appeals, and that, if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the Circuit Court."

The court in that case further say, that the intention of the act was that the appellate jurisdiction should be distributed, and that there should not be two appeals. If there was a Federal question involved, the plaintiff has elected to appeal to the Circuit Court of Appeals. Having been beaten there, he is not entitled to another appeal to this court.

The case of Spreckels Sugar Refining Company *v.* McClain, 192 U. S., 397, 408, cited by defendant at page 19 of his brief, does not sustain the plaintiff's contention. In that case, not only was the construction of the war revenue act of June 13, 1898, involved, but the rights of the parties depended, on the plaintiff's own showing, upon the constitutionality of such statute, and the construction and application of the Federal Constitution. Upon that latter ground, a majority of the court were of the opinion that the defeated party had the right to invoke the jurisdiction of this court.

We submit that the writ of error must be dismissed, with costs to the defendant in error. And that the judgment of the Circuit Court of Appeals should stand as final.

If the court should determine to hear the cause upon the merits, we submit the following points:

SECOND POINT.

The defendant agreed to equip plaintiffs' premises with a designated apparatus, "with an approved system of fire extinguisher apparatus," to wit, a "system of wet pipe Grinnell automatic sprinklers," in the manner provided in said contract, and "in conformiy with the Improved Risks Commission's standard for automatic sprinkler installations." The referee found as matters of fact, that the defendant performed its contract in all respects (5th and 6th Findings, p. 96), and after its approval by the Improved Risks Commission the apparatus was accepted and paid for by the plaintiffs. Hence, as matter of law, the defendant was discharged of all further liability to the plaintiffs or to anyone else.

The defendant by its contract agreed to furnish a designated system or apparatus. The further principal and important parts of the contract are as follows: "All materials to be first-class, "and all work herein specified to be done in a "thorough and workmanlike manner, and in con- "formity with the Improved Risks Commission's "standard for automatic sprinkler installations." And the further provision: "It is explicitly un- "derstood and agreed that no obligations other

"than herein set forth, and made part of this "proposal and acceptance, shall be binding on "either party." It is plain, we submit, that all materials, and all work must be approved by the Improved Risks Commission, and conform to its standard. The parties selected this Commission or its inspector, Jardine, its representative, *as the umpire to determine upon all these things;* to determine whether the materials were first-class; to determine whether the work was done in a thorough and workmanlike manner, and whether it was done, in accordance with the requirements of the Improved Risks Commission. In fact, it is not contended by the plaintiffs that the materials were not first class, for they have abandoned their contention as to the latent defects in the Sprinkler Heads. It is not contended that the piping and the other work was not done in a thorough and workmanlike manner, with this exception; they contend that the installation of these Sprinkler Heads in the skylight, was not a thorough and workmanlike manner of doing the work. But Jardine and Dawley testify, that the plans showed the installation of these ordinary (155°) Sprinkler Heads in these skylights. Jardine testifies that one of the objects of his inspection was to see that the Sprinkler Heads were "properly placed" (fol. 61); that he saw them in the skylight, and approved of their being there; that if the hard, or 286 degree head had been put in the skylight, he would have ordered them out (fol. 98). No possible reason is suggested why it was for the advantage of the defendants to put the Sprinkler Heads in the skylight. In fact, it is plain that it was more trouble and expense to put them there, than to leave them out. *The evidence is, that*

was not. Of course if there was an express warranty in that case, as the Court held there was, then there was no room for an implied warranty. Hence, it has no application to the case at bar. There the seller agreed to deliver:

> " 'Eighty barrels of Japan and 30 bar-
> " 'rels of varnish within one year from
> " 'date, these goods to be exactly the
> " 'same quality as we make for the De
> " 'Witt Wire Cloth Company of New
> " 'York, and as per sample barrels de-
> " 'livered.' "

"These words in the contract distinctly covered the whole question of the quality which the goods should possess for use or for sale. The buyer stipulated that they should be of the same quality as certain other goods, and also as the sample delivered. The oil in question was not sold under such a contract, but under descriptive words, not intended to express the inherent qualities which it should possess as an article of commerce."

Judge O'Brien (p. 604) quotes *Dounce* v. *Dow*, 64 N. Y., and says of it:

"In the latter case the buyer got just the brand of iron that he bargained for."

But, assuming there was on the Defendant's part an implied warranty that the apparatus should be free from latent defects, still, as above remarked, any inference from the evidence introduced by the Plaintiff, going to show that there was any such latent defect in the Sprinkler Heads, *was entirely overcome by the Defendant's evidence on the Trial,* and the Plaintiff abandoned that claim.

The only other claim of the Plaintiff which needs notice in this connection, is his claim that there was a breach of the Defendant's agreement, in that they negligently and improperly installed the Sprinkler Heads in the skylight. As above suggested, we think a complete answer to this is that it was a part of the business of Jardine, and a part of his business which he recognized, to determine where the Sprinkler Heads should be placed. That was an essential part of the system. He was not our agent for placing them. He was an umpire chosen by the parties to pass upon that very question, among others. Upon the function of the Inspector in this case, the language of the Court of Appeals in *Carlton* v. *Lombard Ayres & Company* (149 N. Y., p. 150) is very partinent. In that case the Rules of the Petroleum Exchange provided, that the acceptance of the petroleum by the buyers' inspector should be an acknowledgment, that the goods were in accordance with the contract; and the Court say:

> "As we have seen, the Inspector so certified. The Inspector was not the agent of either party, but an umpire, so selected to determine whether the article delivered alongside the *Corby* corresponded with the contract. The parties in effect submitted a certain question to the decision of the Inspector, and that was whether the oil corresponded in brand, color, and fire test with the contract. He was not authorized to determine, whether there was or was not, any hidden or latent defects in the article at the time and place of the delivery which would render it unmerchantable. That question was not within the fair scope or purpose of the inspection, and the certificate on this point does not conclude the parties. If, however, the de-

it was required by all the reputable companies, and required by the Improved Risks Commission. Hence the defendants were obliged to put them just where they did put them, in the skylight. Inasmuch as the defendants, under the contract, must perform the contract in conformity with the requirements of the Improved Risks Commission, and the Improved Risks Commission required 155° sprinkler heads to be put in the skylights, the contract between the parties is the same as if, in so many words, it had provided that two 155° sprinkler heads, should be put in each of the skylights and so the learned Referee held (p. 166).

Full effect must be given to the clause: *"It is explicitly understood and agreed that no obligation other than herein set forth, and made a part of this proposal and acceptance, shall be binding upon either party."*

In this case there is no obligation or warranty express or implied, on the part of the defendants, although they manufactured the apparatus, that it should be adapted for the purposes intended, for two reasons: (1) the plaintiff required a designated apparatus to be installed, in conformity with the Improved Risks Commission standard. This the defendant has done. In other words, the plaintiff has received exactly what he bargained for.

In the case, in the United States Supreme Court, of *Seitz* v. *The Brewers' Refrigerator Machine Co.,* 141 U. S., 510, the Court held, that where a known, described and definite article, is ordered of the manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing

be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

(See the Opinion of the Court, Fuller, C. J.)

(2) There is an express warranty in this contract, and that is that the apparatus, work, etc., shall be "in conformity with the Improved Risks Commission *standard.*"

The defendant expressly warrants that the job shall be up to a certain "standard," or quality.

In *De Witt* vs. *Berry*, 134 U. S., p. 306, the Supreme Court held that

> "An express warranty of quality in a sale, excludes any implied warranty that the articles sold were merchantable, or fit for their intended use."

The words in this case were:

> "These goods to be exactly the same quality as we make for the De Witt Wire Cloth Co., and as per sample barrels delivered."

Justice Lamar, giving the Opinion of the Court, says:

> "In the case at bar there was such an express warranty of quality in terms. Not only that, but there was a sample delivered and accepted as such. The law is well settled that under such circumstances implied warranties do not exist."

On the motion for re-argument of *Carlton* vs. *Lombard Ayres Co.*, 149 N. Y., p. 603, the Court of Appeals, referring to *De Witt* vs. *Berry*, say:

> "In that case the Court held there was an express warranty. In this case we hold there

fects which the plaintiffs now claim existed at the time of delivery, and which they claim to have produced the damages, were discernible upon the inspection contemplated by the contract, they were not hidden or latent defects within the meaning of the rule; and in that case the certificate would conclude the parties. If in executing the power to determine the brand, color, fire, test and gravity of the article delivered, any other defect which would render it unmerchantable would necessarily appear, the plaintiffs are concluded as to that defect by the certificate of the Inspector.

"(*Studer* v. *Bleistein*, 115 N. Y., 316; *Monitor Milk Pan Co.* v. *Remington*, 41 Hun, 218.)"

Now let us apply the rule to this case. It is important to bear in mind, that Jardine was the Inspector of the Improved Risks Commission. That he was a man who had five or six years' experience, at that time in inspecting, on behalf of the insurance companies, this same kind of work; and that previous to that time, for a period of years, he had been engaged practically in installing such work. Also that in this case, it was stipulated between the parties (see fol. 58), in substance, that his report constituted the approval of the said Improved Risks Commission, of the installation of the System in question. That the insurance rate upon said buildings, was materially reduced by the insurers by reason of said Jardine's approval. That the object of the Commission was to inspect buildings for the purpose of ascertaining the fire hazard upon them, including the condition and fitness of any Sprinkler devices installed in them, in order to aid in ascertaining the proper rate of in-

surance, etc. (See Stipulation and Report, fols. 58, 59.)

Now we claim that if it was a defect in the Defendants' work to place these Sprinkler Heads in these skylights, then that defect was seen by Jardine; that it would necessarily appear upon the inspections which he made, that the work was there. That he knew the heads were placed there is shown; that he approved of it both before and after it was done, is shown. He was competent as an expert to determine that that was a wrong place to put them, if it was such. In other words, the defect, if it was a defect, was not a latent defect, or a hidden defect, but was open and visible to anybody having the experience in such matters, that Jardine had. It was not the business of the defendants, to put their judgment in place of Jardine's. They could not have done so, if they had wanted to. Jardine, in fact, testified that if they had put in there hard heads, or 286 degree sprinkler heads, he would have ordered them out. (The defendant made 155°, 286° and 360° heads; "We have made a few 212°, but not within the last few years" fol. 69.) The plaintiff claims that it was negligence on our part, that we did not make some examination, to determine to what probable heat the heads would be exposed in that skylight. There is no warrant for this claim. *Jardine was the man chosen by the parties as the umpire to determine all such matters.* If Jardine had determined that the sprinkler heads were not properly located, the defendants would have been obliged to change the location. Bagley and defendants were equally bound by Jardine's determination. The plaintiff claims that it was neg-

ligence on the part of the defendants, to put the 155 degree heads in their skylights; that defendants' doing so was a breach of their contract, to do the work in a thorough and workmanlike manner. The provision in the contract that the work, etc., should be in conformity with the Improved Risks Commission standard, was the controlling part of the agreement. Jardine, the representative of the Improved Risks Commission, was the party selected to determine, whether the work was done in a thorough and workmanlike manner. Unless the location of the sprinkler heads, and the kind of sprinkler heads and the quality, and kind or quality of the workmanship was approved by the inspector, the defendants could not fulfil their contract, and it follows that when the work was inspected, passed, and approved by the inspector, defendant had fully performed its contract. Hence defendant is not liable to the plaintiff either for breach of contract, for negligence, or for any cause whatever. The clause in the contract, "and in conformity with the Improved Risks Commission standard" qualified the preceding clauses, in the paragraph. The commission's inspector was made by the parties the umpire, to determine whether the material used was first class; whether the work was done in a thorough and workmanlike manner. In the absence of fraud or collusion, neither party could dispute his verdict. That this construction of the contract is the right one, clearly appears from the fact that Bagley's purpose in having the sprinkler apparatus put in his building, was to obtain a reduction in the insurance rates for himself and his tenants.

To accomplish this purpose the apparatus must be installed "in conformity with the Improved

Risks Commission's standard," and approved by their inspector. In fact, this provision of the contract was for Bagley's benefit. It would have cost the defendants a trifle less, not to have extended the pipes up into the skylights; and whether the four heads in the skylights were 155° or 286° was of no consequence to defendant. The difference in cost, if anything, could be of no consequence. There is no conceivable reason why the defendant should have used 155° heads, and located them in the skylights, other than that defendant was obliged to do so, to make the work in conformity with the Improved Risks Commission's standard. It is idle for the plaintiff to argue, that it does not affirmatively appear that Jardine would not have approved the work if no sprinkler heads had been put in the skylights. "You never can tell the consequences of things you have not done," is one answer to the counsel's suggestion. Another answer is, that defendant's work was, in fact, in conformity with the commission's standard, and was approved by the commission's inspector"; and it is useless to speculate whether, if the work had been done in a different way, it would have conformed with the commission's standard, and been approved by their inspector.

Counsel for plaintiff alleges that the words: "All materials should be first-class and all work "herein specified be done in a thorough and work-"manlike manner" are independent stipulations on the part of the defendant, that they are not qualified or controlled by the following words: "and in conformity with the improved risk com-"mission standard for automatic sprinkler instal-"lations." Even if this be so, the result would

not be different. The Referee found (Sixth finding, page 96), that the work and materials were all first-class. Indeed, the plaintiff abandoned the contention that the materials were not first-class. Plaintiff's counsel contends that it was not a thorough and workmanlike manner for the defendant to install the sprinkler heads in the skylights, without first ascertaining the degree of heat the heads there would be likely to be exposed to. The words "thorough" and "workmanlike" here have, we think, their usual meaning: That the mechanical part of the work should be thorough and workmanlike, *i. e.*, that the piping and other parts of the apparatus, for instance, should be properly fitted and fastened, etc., etc.; *that these words do not apply to the general plan or scheme of the work; that they do not apply to the location of the pipes or the location of the sprinkler heads.* The plan or scheme of the work, including the location of the sprinkler heads, was to be determined by the Improved Risk Commission. Accordingly, the defendant submitted its plans to the agent of the Improved Risk Commission and obtained his approval before beginning the work. In any event we think it was the duty of the inspector Jardine to see to it, that defendant's material was first-class and its work thorough and workmanlike—as well as to determine the general plan of the work. It follows that after he inspected and approved the work, it must be presumed that he did his duty in all respects, and plaintiffs were bound by his decision to the effect, that the materials were first-class, and the work done in a thorough and workmanlike manner.

THIRD POINT.

The defendant is not estopped by the Michigan judgments from setting up and proving its defense, that it has fully performed its contract with plaintiff, and therefore is not liable to plaintiff for any cause whatever. In other words, the judgments are not res adjudicatae.

Our point is that those judgments are not *res adjudicatæ,* upon the question of our liability to the plaintiff, because that issue was not (and could not have been), tried in the Michigan actions, and *so the Referee held as matters of fact;* see 27th and 28th findings, fols. 114-115. The claim of the tenants in the Michigan suits was, in substance, that the Bagleys, for a valuable consideration, had agreed to install in their building, for their benefit, "a suitable automatic sprinkler system", fol. 101, *i. e.,* a system adapted for the purposes for which it was required by their tenants, and the judgment in those suits found, in substance that the Bagleys failed to supply such "Suitable" system and hence were liable to their tenants in damages. It could be, no answer to the tenants' claim for the Bagleys to show that they made the contract which they did with the defendant, and that the apparatus was installed in accordance with that Contract, and in conformity with the Improved Risks Commission Standard. That Contract, and such evidence, would be entirely irrelevant and immaterial, as between the Tenants and the Landlords.

That the issues in this action were not litigated in the Michigan cases clearly appears from the quotation from Judge Frazer's charge, *supra.*

The Defendant did not owe the same duty to the Bagleys, that the Bagleys owed to their tenants. The Bagleys, the Michigan Court said, were bound to give their tenants "a suitable automatic sprinkler," *i. e.,* one which would answer the purpose intended. And the Court, in their Opinion, say that the Bagleys were free to install any System they chose. The contract between the Bagleys and the defendant, was not the same as the contract between the Bagleys and their tenants. As between the Bagleys and the Defendant here, the Defendant's duty was to fulfil its contract, and that contract was to install a designated apparatus, in conformity with the standard of the Improved Risks Commission.

In *Reynolds* v. *Aetna Life Ins. Co.,* 160 N. Y., 635, *supra,* it was held that a Judgment is not conclusive in a second Action, unless the *same question was material and at issue* in a former suit, of which the Court had competent jurisdiction, and a subsequent action is between the same parties or their privies.

The case of *Prescott* v. *Leconte,* 83 App. Div., 482, cited by the Plaintiff's Counsel, recognizes the very principle and distinction for which we contend, as appears from the opinion of the Court quoted, *supra.*

Now there was no "primary" or other duty on the part of the defendant to install a "Suitable Automatic Sprinkler System" which would answer the purposes for which the Tenants wanted the System installed. Its only duty was to the Bagleys, and that duty was to perform the Con-

tract which it made with the Bagleys. That duty it performed. In the case of *Washington Gas Light Co.* v. *District of Columbia,* cited by plaintiff's counsel, 161 U. S., 316, it was the primary duty of the Gas Company to keep the gas box in the sidewalk in proper condition. It was also the duty of the District of Columbia to keep the sidewalk in a safe condition; and if any person who was injured recovered damages from the District of Columbia, it is quite clear that the District of Columbia had a cause of action against the Gas Company, whose *primary* duty it was to keep their gas box in the sidewalk in proper condition.

The first question in that case as stated by Mr. Justice White, who delivered the Opinion of the Court, was:

> "*First.*—Did the legal duty rest primarily on the Gas Company to repair and keep the gas box in order?"

That question the Court solved in the affirmative.

The second question, as stated by the Court, was:

> "Had the District of Columbia a cause of action against the Gas Company, resulting from the fact that it had been compelled to pay damages, in cases of defective gas boxes which it was the duty of the Gas Company to supervise and repair?"

That question was also answered in the affirmative, the Court citing the case of *Chicago* v. *Robbins,* 67 U. S., 418, 422.

The fourth question, as stated by the Court, was as follows:

"Was the judgment against the District, rendered after notice to the Gas Company, and opportunity afforded it to defend, conclusive of the liability of the Gas Company to the District?"

Which question was also answered in the affirmative, the Court again citing the case of Chicago *vs.* Robbins.

But this latter case recognizes the distinction which we insist on. In Chicago *vs.* Robbins the city was held liable for damages for not keeping a public street in good condition; and a third person, it was held, was liable over to the city if he had so used the street as to produce the injury, *unless* "it was also a wrongdoer" (Opin.), and such third party was concluded by the judgment against the city if he knew the suit was pending, and could have defended; *but the Court say that in an action brought by the city against such third party it is competent for the defendant to show "that he was under no obligation to keep the "street in a safe condition, and it was not through "his default that the accident happened"* (Opin.).

See the Opinion, 67 U. S., 423.

The Supreme Court say that the third party is liable, "unless it (the City) has been itself at "fault," which is tantamount to saying that if the city was in fault the third party would not be liable to the city. For instance, supposing the city had given permission to the third party to make the use of the street complained of. Evidently the city could not complain, and hold the third party liable, in case the city was cast in damages at the suit of some person injured. The city has concurred in the wrong. The city has given to the third party the right to do exactly what he

has done; and is estopped from making any claim against such third party. The Court further said that the third party was not "estopped" by way of defense, to show that he was under no obligation to keep the street in a safe condition, and it was not through his default that the accident happened. The city might be liable to a stranger, who, in using the street, was injured by an act of the third party, which the city had authorized this third party to do by a use of the street, which the city had authorized the third party to make.

In the case at bar, the defendant is not estopped from showing that it was under no obligation to the Bagleys to install a "SUITABLE" automatic sprinkler system" that would answer the requirements of the tenants, or, in fact, to install any apparatus, except the apparatus they, by their contract, agreed to install.

So in the case of *Mayor* v. *Brady*, 151 N. Y., 611, cited by the counsel for the plaintiff. The contractors, as well as the city, were bound to perform the same duty; that is, to keep the street free from defect or obstruction.

In *Carlton* v. *Lombard-Ayres Co.*, at p. 152, 149 N. Y., the Court of Appeals in its opinion, say:

> "It is quite true that the record" (that is, the record of the former judgment), "would not prove that the defects were latent, or such as would not be disclosed by the inspection contemplated by the contract, since that question was not involved on the former trial, and the plaintiffs did not offer it for that purpose. It could not be excluded, however, because it did not prove the plaintiffs' entire case. If it proved any material fact in support of it, it was admissible. It did, we think, establish, as against the defendant, the fact that the oil when delivered alongside the

Corby, was unmerchantable, since that was the ground upon which the parties in Calcutta recovered the damages, as we must assume from the present condition of the record. The plaintiffs, were, of course, bound to show by other proof that the defects, which rendered the goods unmerchantable were latent, and were such as would not be disclosed by the inspection."

While the judgments in Michigan, may be evidence here against defendant, of the amount of the damages, the defendant is not estopped from showing, that it was under no obligation whatever to plaintiff's tenants, and under no obligation to plaintiff which it had not fully discharged.

If all implied warranties were *not* excluded by the express warranty, still, in the case at bar, the plaintiffs, in order to bring themselves within the decision in the case of *Carlton* vs. *Lombard-Ayres Co.* (*supra*), inasmuch as the work was inspected by a third party, selected by the respective parties, must show that there were latent defects, and such as would not be disclosed by the inspection. This they utterly fail to do. It would be a most extraordinary result, if the defendant should be held liable to the plaintiff for neglecting a duty, which duty the defendant was under no obligation to perform!

If the installation of this fire extinguishing apparatus, in the manner called for by the defendant's contract, was negligence, the plaintiff is the person guilty of the primary negligence; for, in order to get the reduction of insurance rates desired, his contract required the defendant to do the work in conformity with the Improved Risks Commission standard. The plaintiff is certainly

estopped, by every consideration of fairness and justice, from making this claim against the defendant.

FOURTH POINT.

The cases cited by the counsel for the plaintiff are properly to be distinguished from the case at bar, and do not establish the plaintiff's contention.

With respect to the case of Prescott *v.* LeConte (83 App. Div., 482), as the learned Referee remarks at page 161, the injuries sustained were caused by defendant during the performance of the work, and was the result of the defendant's omission to protect the opening in the roof; in consequence of this omission the occupants of the building were damaged. There are no such facts in the case at bar.

The case of Kumberger *v.* Congress Spring Co. (158 N. Y., 239), differs most materially in its facts from the case at bar. The Court of Appeals reversed the courts below, "for the error committed by the trial court in directing the jury to render a verdict for the plaintiff," and directed a new trial (p. 346). The Court held, that it was for the jury to determine upon the conflicing evidence, whether under the contract the defendant had agreed to furnish a suitable foundation upon which the engine, sold by the plaintiff, might be erected. In the case at bar, there is no

question of fact as to what the contract between the parties was. In the case at bar, the parties selected Jardine as umpire to determine where the apparatus should be located. In the Kumberger case, the plaintiff alleged, that the plaintiff was to furnish a proper foundation on which the engine was to be erected; this the defendant denied. The words of the court at page 346 (Kumberger case) as follows:

> "That is to say, if the plaintiffs suffered "the engine to be erected upon an inadequate "and improper foundation, when a word of "advice to the defendant's officers, might "have caused them to provide a proper place, "then the plaintiffs should fairly be held re- "sponsible for any consequent damage which "was a direct result," seem to be *obiter.*

Certainly, they are not necessary to support the decision of the court; for the court at page 344, held that a question of fact was raised, and hence it followed that a direction by the trial court for a verdict for the plaintiff, was error, and therefore, the defendant was entitled to a new trial, which the Court of Appeals awarded: Further, in the Kumberger case, the court assumed in its opinion, that the plaintiff found no proper place on which to erect the engine. In other words, it assumes, that the place where the plaintiff erected the engine *was plainly and obviously,* an unfit place for such an erection."

In the case at bar, the situation was very different. Dawley, the defendant's manager, testified, fols. 85 and 86, "The usual practice in our company and in other reputable companies requires putting heads in skylights. Good practice requires companies to place in skylights, if any are

placed there, the ordinary 155 degree heads. * * * Our system is installed in other buildings in Detroit. I have never known a sprinkler head to go off except in this building, where it has been placed in the skylight." Not only was Jardine the selected umpire to determine for both parties, where the sprinkler head should be located, but the universal practice up to that time, was to locate sprinkler heads in the skylight. There was no reason why Jardine or defendant, at that time should not have believed and supposed, that the skylight was a perfectly proper place wherein to locate the sprinkler head. The remarks of the learned referee, in his opinion, at page 164, are pertinent here:

> "Undoubtedly no one thought of the possi-
> "bility, that in any part of the buildings the
> "natural heat might arise under any condi-
> "tion as high as 155 degrees, or that the
> "sprinkler heads which were installed would
> "melt or fuse under conditions arising from
> "natural causes when there was no fire.
>
> "Such a condition was not to be anticipated
> "in any building in Detroit in ordinary use,
> "and the conditions which created it on the
> "day of the accident were not of the defend-
> "ant's creation, but of the plaintiff and his
> "assignors."

In Kellogg Bridge Co. *v.* Hamilton, 110 U. S., 108, the buyer had no opportunity to inspect the article, for the reason that from the situation, inspection was impracticable or useless. In the case at bar, the buyer, the plaintiff, by his contract made Jardine, the inspector, and Jardine had not only the opportunity, but he carefully inspected and approved of the apparatus, *after its* installation.

In Cox *v.* Mason, 89 App. Div., 219, defendant made an express agreement at the time of sale, to put up the folding bed in a safe condition to use; he failed to do so, plaintiff's wife was injured, and, of course, the defendant was liable in damages. The difference in that case from the case at bar is this, that in that case there was a breach by the defendant of his agreement; in the case at bar, the defendant fully performed its agreement. So in the case of Boston Woven Hose Co. *v.* Kendall, 178 Mass., 232, there was a clear breach of the defendant's agreement, as to the quality and character of the boiler the defendant sold; damage and injury arose because of this defect in the boiler, whereby third persons were injured. The purchaser was obliged to pay damages; these damages the court held, plaintiff, the purchaser, could recover from defendant. In that case the defendant was "*primarily*" liable.

Numerous other cases cited by the learned counsel, we think, have no direct bearing upon the questions involved here.

FIFTH POINT.

Full effect must be given to this provision in the contract: "It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party."

We submit that this provision excludes all stipulations and obligations not fairly to be drawn from the words of the written agreement.

With respect to this provision the learned Referee in his opinion at fol. 166, says:

> "Effect must be given to this provision, "and in my opinion it prohibits any liability "of the defendant upon any implied covenant "or warranty and limits its obligations to "those which are expressed."

The extensions of the obligation, which the counsel for plaintiff, seeks to read into this agreement are, we think, excluded by this plain provision. The words used are apt words to express such intention. The Circuit Court of Appeals in their opinion as to this provision of the contract say: "And we are therefore constrained to agree with the referee, that some substantial effect must be given to this provision, and that such effect operates to relieve the defendant from liability" (fol. 224).

SIXTH POINT.

Most of the points made by the learned counsel for the plaintiff in error, proceed upon the erroneous assumption that the judgments in the Michigan courts find that the defendant had been negligent.

We think we have shown that there is no foundation for this claim of the plaintiff. We submit further that the statement contained in the tenth point of the plaintiff, that the Circuit Court of Appeals held that the apparatus as erected was unfit for the purpose it was designed to serve, is hardly warranted by the views expressed by the Circuit Court in their opinion. We think that the opinion of the Circuit Court of Appeals, taken as a whole, clearly shows that that court confirmed the correctness of the conclusion of the referee upon two of the grounds on which the referee decided the case in favor of the defendant, and as to the third ground they state that their conclusion upon the other two grounds dispenses with the necessity of discussing the correctness of the third ground (fol. 223). At folios 225 and 226 of their opinion, the Circuit Court of Appeals discuss the claim of the plaintiff that the evidence failed to show that the work specified was done in a thorough and workmanlike manner. These claims they discuss, and, in the course of their opinion, at folio 226, they say:

> "In these circumstances we think the referee would have been justified in holding, that when the defendant installed the apparatus,

it had a right to assume that these ventilating windows would be made available for the use for which they were intended, at the time when such use was necessary or proper. And in view of the uncontradicted evidence that the installation was in accord with the usual practice in such buildings, and of the finding as to lack of draughts of air, we cannot say, merely because the heads fused, on a hot day when all the windows were closed, that the work was not done in a workmanlike manner. Furthermore, it appears that, as a part of the apparatus when it was installed, a gong was provided, the purpose of which was to ring the alarm in case of an accident to the sprinkler system, and that the gong sounded at the time of the accident, and that if a watchman had been on the premises at the time when the gong sounded, the flow of water could have been turned off without serious damage.

"While it is argued that good workmanship requires some further measures of protection against the rays of the sun, there is no evidence as to the use of any such protectors in said system. And while it is argued that defendant should have used sprinkler heads intended to fuse only at a higher temperature, it appears that if the 286 degree sprinkler heads had been used the Inspector of the Risks Commission would have ordered them out, and that within the last few years defendant had made no sprinkler heads to fuse at any point between 155 and 286 degrees.

"In these circumstances, inasmuch as it does not appear that the accident would have occurred if the ventilating windows had been open, or that the damage would have resulted if there had been a watchman on the premises, and as it appears that if heads intended to fuse at the higher temperature had been

furnished they would not have been approved by the Commission, we think there is sufficient evidence to support the finding of the referee as above."

In the plaintiff's fifteenth point, it is claimed that it was error for the trial court to exclude the admission of the defendant's general manager, Dawley, "that it was unworkmanlike to have placed 155° heads in the skylights." The statement of the counsel in the fifteenth point and on page 54 as to the record is misleading. The question which was excluded is at folio 57. Referring to an interview between Mr. Dawley and Mr. Bagley, after the accident, the following question was asked by plaintiff's counsel:

"Q. Upon returning from the building on that occasion, did he make a statement to you as to the propriety of placing these 125 (*sic*, 155) heads in the skylights?

"Objected to as incompetent and irrelevant.

"Objection sustained.

"Exception to plaintiff."

The objection was good and properly sustained. What happened a long time after the execution of the contract, and after the accident, was certainly no part of the *res gestae*. Further, the plaintiff did not then and there, before the referee, on the trial, offer to prove that Mr. Dawley said that placing the 155° heads in the skylights was unworkmanlike. There is no offer of the kind in the record. For aught that appears, Mr. Dawley on that occasion might have said, if he said anything on the subject, that it was perfectly proper to put 155° heads in the skylights.

The plaintiff's counsel read in evidence on the trial the deposition of Dawley taken in the Michigan suit. At folio 86, this witness testified as follows:

> "The usual practice in our company and in other reputable companies requires putting heads in skylights. Good practice requires companies to place in skylights, if any are placed there, the ordinary 155 degree heads. It is not necessary to use the higher temperature sprinkler. A very hard head in such a place as a skylight would not open as readily as the lower temperature sprinkler. The fire might gain greater headway. In case of a fire the temperature of the upper portion of a building is greater than the lower, and it is desired by sprinkler companies that as soon after a fire starts as possible these heads fuse and let the water out. In my judgment it was proper to place in this Burnham-Stoepel skylight sprinkler heads of the 155 kind. This particular system was provided with an alarm, or gong. The water flowing in the pipe would sound the alarm either from fire or breaking in the pipe. It is run by electric battery. If the water is shut off, it would stop the alarm. Our system is installed in other buildings in Detroit. I have never known a sprinkler head to go off except in this building where it has been placed in the skylight."

Furthermore, it was not for Dawley or the defendant to decide whether 155° heads should be put in the skylights. It was the duty of Jardine, the inspector of the Improved Risks Commission, to decide that, and he testified, and the referee found, that if they had put the hard or 286° heads in the skylights, he (Jardine) would have ordered them out (fol. 98).

Counsel at page 54 states that Dawley "had in consequence of it (the accident) sent to the plaintiff for use a box of their harder 286° heads (fol. 28) and had arranged with the plaintiff for compensation to them for the damage to their building, which was thereupon paid by the defendant", etc. The plaintiff at folio 28 testified as follows: "Mr. Dawley, the manager of the concern in Chicago, came to Detroit soon after the flooding of the store. I went to the building with him. After that conversation, he sent us a box of the harder heads from Chicago, the 286° heads." There is nothing to show whether Dawley sent these heads of his own motion, or because Bagley ordered them.

At folio 56, Hopkins, one of the plaintiff's witnesses, testified that after the accident, in the course of conversation with Dawley, he made a claim for the damage which the building itself had suffered owing to the flooding. Thereupon the plaintiff's counsel asked the following question: "Did he make an offer for an adjustment of the damages to the building?" This was objected to as incompetent and irrelevant and the objection sustained, with an exception to the plaintiff. Also, "Q. In consequence of the conversation which you then had with Mr. Dawley, was a sum of money paid to you by the defendant for the damage to the building?" On objection, this question was also excluded, and the plaintiff excepted.

The ruling of the learned referee was entirely correct. A person against whom a claim is made may try to buy his peace, and may be willing to, and actually pay money with that view. These facts, however, are no evidence that the claims made are just or legal claims. To have admitted

such evidence in the case of a jury trial, would have been flagrantly improper. We respectfully submit that the fifteenth point of the plaintiff is not well taken.

SEVENTH POINT.

The case may be briefly summarized as follows:

(1) The Plaintiffs, for good consideration, agree with their *tenants* to install a "Suitable Sprinkler System" in their buildings, *i. e.*, a system adapted to the purposes required by the *tenants*.

(2) One of the principal objects of such equipment on the part of the plaintiffs is to secure reduced rates of insurance.

(3) Plaintiffs cannot accomplish this object unless the equipment is inspected and approved, or, in other words, is in conformity with the Improved Risks Commission's standard; hence that provision in the contract plaintiffs made with defendant, which contract was very different from the contract plaintiffs made with their tenants.

(4) This Commission is an Association of Fire Insurance Companies.

(5) The plans for the installation of the work were prepared by defendants, and submitted to and approved by the representative of the Improved Risks Commission.

(6) These plans show the placing of 155 degree Sprinkler Heads in the skylights.

(7) Up to that time the placing of such Sprinkler Heads in skylights was "required" by the Insurance Companies, and was the usual practice of defendant and other reputable companies.

(8) The contract provided that the work should be of first class material, and done in a thorough and workmanlike manner, and in conformity with the Improved Risks Commission's standard.

(9) After the work was completed, the representative of the Improved Risks Commission examined it thoroughly, to see, among other things, whether the Sprinkler Heads were properly placed; saw that the 155 degree Sprinkler Heads were located in the skylights, and if 286 degree Heads had been located there, would have ordered them out.

(10) After such inspection, the work was approved by the Inspector; the plaintiff was notified of such approval, and thereupon paid the contract price, which they would not have paid had it not been approved.

(11) Thereafter the plaintiff and his tenants obtained the reduction wished for in the rates of insurance.

(12) The system was supplied with a gong, which went off in case water escaped from the pipes.

(13) If a watchman had been on the premises at the time of the accident, little or no damage would have been done. There was no watchman.

(14) On a very hot day, on the Fourth of July, which was a holiday, when the windows in the skylights were closed, though the ventilating pipes were open, the Sprinkler Heads in the skylight burst, and flooded the premises, occasioning the damage in question.

(15) The water flowed apparently for several hours before it was discovered, there being no watchman in the building.

(16) The tenants sued the Bagleys in the Michigan Courts, and recovered damages, it appearing that the Bagleys had agreed to install a "suitable automatic Sprinkler System."

(17) There were circumstances shown on the trial of those actions by the witness Conant, from which the jury might infer that the sprinkler heads in the skylight burst at a degree of heat less than 155 degrees.

(18) Upon the trial of the case at bar it was shown by the defendant that the facts proved on the trial of the Michigan cases, from which the jury might infer that the Heads burst at less than 155 degrees, were entirely unreliable; and that there were no circumstances proven in the case at bar upon which a jury would be justified in finding that the Sprinkler Heads burst at less than 155 degrees.

As matters of law—

(1) The Judgments in Michigan, while they are evidence for some purposes, are not conclusive upon the defendant, and do not prevent the defendant from raising the defenses which were not in issue, and could not have been put in issue in

the Michigan suits. (The Court, in the suit of the Peerless Company against Bagley in the Michigan Court, charged the jury that the question of the liability of the Fire Extinguisher Company to the Bagleys was not involved in the Michigan action.

(2) The proper construction of the contract is that Jardine, the representative of the Improved Risks Commission, was made by the parties the umpire to pass upon the questions whether the work was of first-class material; whether the work was done in a thorough and workmanlike manner; and whether it was in conformity with the Improved Risks Commission's standard. That, as Jardine thoroughly inspected and approved the work, and it was thereafter accepted and paid for by the plaintiff, the defendant was under no further liability whatever to the plaintiff, either for breach of contract or for neglect.

(3) That if the duty of Jardine was confined only to determining whether the work corresponded to the standard of the Improved Risks Commission, the result is the same; for there is no question but, on the proofs, the material was first class, and the work was done in a thorough and workmanlike manner, because it was done in the manner required to accomplish the purpose which the parties to the contract had in view. *The Insurance Companies required 155 degree Heads to be put in the skylights. Up to that time no accident or harm had come from such installation.* Putting such Heads, therefore, in the skylights was a thorough and workmanlike manner of doing the work in the contemplation of all the parties.

(4) The only material that has been called in question was the material of which the Sprinkler Heads was in part made. It was conclusively shown on the trial by the defendant that the material used in the manufacture of the sprinkler heads was first class, and that the greatest care was exercised by the defendant in manufacturing them, and that such sprinkler heads would not go off at a less degree of heat than 155 degrees.

(5) There being an express warranty, there are no warranties to be implied. It having been shown that the defendant fully performed its covenant and express warranty, there was no breach on its part, and no cause of action in favor of the plaintiff.

(6) If, in spite of the express warranty in the contract, defendant is still called upon to show that the work and material were free from latent defects, the defendant has done so upon the trial. It is shown conclusively that there were no defects in the sprinkler head. Assuming that it was a defect to put the 155 degree heads in the skylights, such a defect is not a latent or concealed defect. It was one which was patent, and visible to a man like Jardine, who had had large experience in those matters. As to the testimony of Dawley to the effect that he would not put the 155 degree Sprinkler Heads in any place where the temperature was greater than 135 degrees, etc., evidently Dawley is speaking of what he would have done, in the light of an experience which had come to him by reason of this accident. But it was Jardine the inspector and not Dawley—whose duty it was, under the agreement between the parties to locate the places for putting the sprinkler heads. Furthermore,

what disposes of that whole contention on the part of the plaintiff is the fact that, in order to get the reduced rate of insurance, which was the chief object of putting in the Sprinkler Equipment, the plaintiff agreed or stipulated that the equipment must be in conformity with the Improved Risks Commission standard and that Commission *required* the Sprinkler Heads to be so placed. It was not the judgment of the Defendant that the plaintiff relied upon, but the judgment of the inspector, and the defendant was bound to do the work, and install the apparatus as this inspector required.

(7) The plaintiff required an apparatus to be installed of a designated kind. That apparatus the defendant installed. The plaintiff having gotten exactly what he bargained for, the defendant is not liable, whether it answered the purpose the plaintiff had in view or not.

Seitz v. *Brewing Company* (*Supra*).

EIGHTH POINT.

The writ of error should be dismissed with costs for want of jurisdiction, or if this Court entertains the writ the judgment below should be affirmed with costs to defendant in error.

New York, January 22, 1909.

Peter B. Olney,
Counsel for Defendant in Error.